TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON, PLAINTIFF IN ERROR,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, AND GEORGE D. MOORE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED AUGUST 30, 1905.

(19,890.)

(19,890.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON, PLAINTIFF IN ERROR,

vs.

J. A. MAGOON, W. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, AND GEORGE D. MOORE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

INDEX.

	Original.	Print.
Proceedings in circuit court of first circuit	1	1
Summons and return	1	1
Amended declaration	3	2
Exhibit A—Agreement between the African Pacific and Indian Hagey Company and Alfred Edward Gilmore and Thomas Milner Harrison, September 20, 1897	7	4
Demurrer	11	7
Decision on demurrer	13	8
Exception to decision on demurrer	16	9
Plaintiff's bill of exceptions	17	10
Statement of proceedings	17	10
Judge's certificate	18	11
Proceedings in supreme court	19	11
Clerk's minutes	19	11
Opinion	20	11

JUDD & DETWEILER) INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1906.

	Original.	Print.
Proceedings in circuit court of first circuit	46	28
Amended declaration	46	28
Exhibit—Agreement of September 20, 1897	49	30
Answer to amended declaration	52	32
Motion to amend answer	53	32
Transcript of testimony, &c.	54	33
Testimony of L. C. Ables	55	33
Mrs. Dorathea Emerson	133	82
L. C. Ables (recalled)	152	93
T. M. Harrison	159	97
Motion for nonsuit	241	147
Ruling on motion for nonsuit	243	148
Stenographer's certificate	244	148
Deposition of Alfred Edward Gilmore	245	149
Exhibit A—Agreement of September 20, 1897	252	154
B—Statement of receipts and disbursements to February 11, 1898	255	156
Plaintiff's Exhibit A—Agreement between T. E. Cowart *et al.* and J. A. Magoon *et al.*, Ap'l 10, 1897	256	156
B—Power of attorney from F. B. McStocker to L. C. Ables, April 10, 1897	259	158
C—Agreement of September 20, 1897	260	159
D—Letter of L. C. Ables to "Dear Mac," October 20, 1897, and memorandum dated September 30, 1897	263	161
E—Letter of L. C. Ables to "Dear Mac," October 29, 1897	264	162
F—Trial balance, November 30, 1897	266	164
H—Agreement of the African Pacific and Indian Hagey Co. and J. Wolfenden, April 10, 1897	267	165
I—Letter of L. C. Ables to Thos. Milner Harrison, October 12, 1897	271	168
J—Power of attorney from John Alfred Magoon and Dorothea Lamb to T. E. Cowart and J. H. Kirkpatrick, April 10, 1897	272	168
K—Letter of Cowart & Kirkpatrick to Dorothea Lamb, October 30, 1897	273	169
L—Letter of T. E. Cowart to Judge Magoon, October 7, 1897	275	170
M—Record from the supreme court of New Zealand	277	171
N—Statement of account	288	178
O—Agreement between the African Pacific and Indian Hagey Co. and Alfred Edward Gilmore and Thomas Milner Harrison, September 16, 1897	289	178
P—Agreement of September 20, 1897	292	180
Q—Agreement between Harrison and Ables, September 21, 1897	294	182
R—Agreement between Harrison and Ables, October 1, 1897	297	183

	Original.	Print.
Plaintiff's Exhibit S—Liquor treatment instructions	298	184
T—Letter of T. M. Harrison to J. H. Kirkpatrick, March 10, 1898	304	188
Stipulation as to New Zealand judgment	305	189
Plaintiff's Exhibit U—New Zealand judgment	306	189
Defendants' Exhibit 1—Letter, Ables to "Dear Mac," January 21, 1898	308	192
2—Letter, Ables to "Dear Mac," September 2, 1897	309	192
3—Letter, Ables to "Dear Mac," October 1, 1897	310	193
4—Letter, Ables to "Dear Mac," November 26, 1897	315	196
5—Letter, Magoon & Lamb to Dexter, September 23, 1897	319	198
6—Letter, Magoon to Dexter, September 23, 1897	321	199
7—Letter, Magoon to Cowart & Kirkpatrick, September 23, 1897	323	200
8—Letter, Magoon to Dexter, December 16, 1897	325	201
9—Letter, Magoon to Cowart & Kirkpatrick, December 16, 1897	329	204
9—Letter, Lamb to Cowart & Kirkpatrick, December 16, 1897	331	205
10—Letter, Magoon to Dexter, October 21, 1897	333	206
11—Letter, Magoon to Dexter, October 21, 1897	334	206
Clerk's minutes	335	207
Motion for new trial	336	207
Order allowing time to present bill of exceptions	336	208
Order dismissing motion for new trial	337	208
Stipulation as to time to file bill of exceptions	337	209
Plaintiff's bill of exceptions	338	209
Testimony of L. C. Ables	338	209
Dorothea Emerson	344	212
L. C. Ables (recalled)	348	215
T. M. Harrison	350	216
Motion for nonsuit	353	218
Discharge of jury	356	220
Motion for new trial	357	220
Order dismissing motion for new trial	358	221
Judge's certificate to bill of exceptions	359	222
Motion to strike from calendar and dismiss exceptions	360	222
Clerk's minutes	361	223
Opinion of the court by Frear, C. J.	362	223
Separate opinion of Hartwell, J.	371	229
Clerk's minutes	373	230
Opinion of the court by Hartwell, J.	374	231
Petition for rehearing	383	237
Amended declaration	409	253

	Original.	Print.
Exhibit A—Agreement of September 20, 1897	413	256
B—Agreement of September 21, 1897	416	258
C—Agreement of October 1, 1897	418	260
Amendment to petition for rehearing	419	260
Clerk's minutes	420	261
Opinion on petition for rehearing	421	262
Petition for writ of error	426	265
Assignment of errors	427	267
Order allowing writ of error	430	267
Bond	431	268
Copy of writ of error	432	269
Copy of citation	434	270
Clerk's certificate	435	271

1 In the Circuit Court of the First Circuit, Hawaiian Islands, *ss:*

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON.

The Republic of Hawaii to the Marshal of the Hawaiian Islands, or his Deputy, Greeting:

You are commanded to summon J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Emerson Defendants in case they shall file written answer within twenty days after service hereof, to be and appear before the said Circuit Court at the February Term thereof, to be holden at Honolulu Island of Oahu on Monday the 5th day of February next, at ten o'clock A. M., to show cause why the claim of Thomas Milner Harrison Plaintiff should not be awarded to him pursuant to the tenor of his annexed Petition.

And you are further commanded to — and have you then there this Writ with full return of your proceedings thereon.

Witness Hon. A. Perry First Judge of the Circuit Court of the First Circuit, at Honolulu, Oahu this 29th day of November 1899.

(S'g.) J. A. THOMPSON, *Clerk.*

2 Endorsed: No. 4464, Law Division. Docket 16/438. Circuit Court First Circuit. Thomas M. Harrison *vs.* J. A. Magoon, *et al.* Summons for February Term, 1900. Issued November 29, 1899 at 2:30 o'clock P. M. Returned by the Marshal December 27, 1899. J. A. Thompson, Clerk.

I hereby certify the service of the within Writ as per returns of Service hereon made by Officer Chas. H. Baker, at Honolulu, Island of Oahu, on the 29th day of November, A. D. 1899.

(S'g.) CHAS. F. CHILLINGWORTH,
Deputy Marshal.

Delivering a certified copy thereof, and of the Petition annexed to the said J. A. Magoon and L. C. Ables at Honolulu aforesaid as directed. Dated November 29, 1899.

(S'g.) CHAS. H. BAKER,
Police Officer.

(S'g.) B. H. BROWN, JR.,
Special Police Officer.

On F. B. McStocker at Keaau, Puna, Hawaii, 18 miles on 7th day of Dec. A. D., 1899, showing him the Original.

I hereby certify the service of the written Writ per returns of Services thereon by Special officer B. H. Brown, Jr.

(Sig.) R. A. LYMAN,
Dep't. Sheriff of Hawaii.

Received a copy of the within summons and complaint and further service waived.

(S'g.) DOROTHEA EMERSON,
(S'g.) By Her Att'y, J. ALFRED MAGOON.

Nov. 29th/99.

3 In the Circuit Court of the First Circuit, Hawaiian Islands, February Term.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, F. B. McSTOCKER, L. C. ABLES, and DOROTHEA EMERSON.

Assumpsit.

Declaration.

To the Hon. A. Perry, First Judge of the Circuit Court of the First Circuit:

The undersigned, a foreigner by birth, plaintiff, claims of J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Emerson *née* Lamb, also foreigners by birth, residing at Honolulu, Island of Oahu, defendants, the sum of Ten Thousand ($10,000.00) Dollars, with legal interest from March 10, 1898, for damages resulting to him for injury done by said defendants, and for cause of action alleges:

That prior to and on the 20th day of September A. D. 1897, the said defendants together with certain other persons, to wit, T. E. Cowart, J. H. Kirkpatrick, George D. Moore, A. E. Powter and James Welfenden were carrying on business as copartners in the Colony of New Zealand and elsewhere under the firm name or style of the African Pacific and Indian Hagey Company.

That on the date last above mentioned, at Auckland, New Zealand aforesaid, the said defendants and their said copartners entered into an agreement with the said plaintiff and one Alfred Edward Gilmore, a copy whereof is hereto attached and made a part hereof, whereby it was agreed that the colony of Tasmania, should be the place or sphere of business under said agreement, and that the
4 plaintiff should go to said Colony and manage the business there.

That by paragraph 4 of said agreement it was provided that if at or before the expiration of six months from the departure of the plaintiff from New Zealand to Tasmania the plaintiff should be dissatisfied with the condition of the said business in Tasmania the defendants would give the plaintiff stock of the market value of an amount equal to the sum paid by plaintiff as a consideration under said agreement, that is to say, stock of the market value of Two

Thousand Pounds (£2000) in some district, other than Tasmania of the field of operations of said partnership.

That in pursuance with the agreement, the plaintiff on or about January 17th, 1898, left New Zealand and went to Tasmania aforesaid for the purpose of managing and carrying on the said business, and that he did so manage and carry on the same at the City of Hobart in Tasmania from the first day of February 1898 to the first day of March 1898.

That the business was not successful and the plaintiff became dissatisfied with its condition and so, on or about the tenth day of March 1898, he notified the said partners to that effect.

That on or about the said tenth day of March 1898, plaintiff made demand upon said partners that under the term of paragraph 4 of said agreement, they should deliver to him stock of the market value of Two Thousand Pounds (£2000.) in some District other than Tasmania of the field of operations of said partnership.

That said partners neglected and refused and still neglect and refuse to deliver said stock or any part thereof or the value thereof to plaintiff.

That on or about the first day of March 1898, the said plaintiff did pay, transfer and deliver unto the said parties of the first part named in said agreement all funds, moneys and assets of said partnership in plaintiff's possession also an account of all disbursements and expenditures made by him for and on account of said partnership, and that said funds, moneys, assets and account were accepted and received by the said partners as true and correct.

That at the present time no unsettled account or indebtedness exists between said plaintiff and his partners except as to claim of £2000. with interest and costs.

Wherefore plaintiff prays judgment against said defendants for said sum of $10,000. with interest and costs.

Second Count.

The undersigned also claims of the said J. A. Magoon, F. B. McStocker, L. C. Ables, and Dorothea Emerson *née* Lamb, defendants, the sum of Ten Thousand Six Hundred ($10600.00) Dollars with legal interest from June 13th, 1899, for that heretofore, to wit, on the 18th day of April A. D. 1898, at the City of Auckland in the Colony of New Zealand, the said plaintiff brought his certain action in the Supreme Court of New Zealand, Northern District, against the defendants together with T. E. Cowart, J. H. Kirkpatrick, George D. Moore, A. E. Powter and James Wolfenden, as partners, doing business together under the style or firm name of The African Pacific and Indian Hagey Company, to recover from them the sum of Two Thousand Pounds (£2000.) damages, and costs.

That at the time of said action and the rendition of the judgment therein, hereinafter mentioned, the said Court was a Court of Record in said City, having jurisdiction over the parties plaintiff and defendant, and also of the subject matter in and of said action.

That thereafter, to wit, on the 13th day of June A. D. 1899, such proceedings were had in said action, that said Court ren-
6 dered judgment in favor of this plaintiff and against the defendants therein, other than the said James Wolfenden and A. E. Powter for the sum of Two Thousand One hundred and Twenty Pounds (£2120.) damages and costs.

That payment of the amount of said judgment or any part thereof has never been made, and the sum now due this plaintiff upon said judgment, with interest, is $10,838.50.

Wherefore plaintiff prays judgment against the defendants herein for said sum of $10600.00 with interest and costs.

And plaintiff asks the process of this Court to cite the said Defendants to appear and answer this complaint before a jury of the country at the February 1900 Term of this Court, unless otherwise sooner disposed of by judicial authority.

Dated, June 13th, 1900.

(Sig.) T. M. HARRISON.

(Sig.) ROBERTSON & WILDER,
Attorneys for Plaintiff.

HAWAIIAN ISLANDS, *Island of Oahu, ss:*

Thomas Milner Harrison being duly sworn, on oath deposes and says, that he is the plaintiff named in the above declaration, that he knows the contents thereof and that the same are true.

(Sig.) T. M. HARRISON.

Subscribed and sworn to before me this 13th day of June, A. D. 1900.

(Sig.) A. A. WILDER,
Notary Public, First Judicial Circuit.

7 "A."

[N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of Agreement made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association, of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members: T. E. Cowert, J. H. Kirkpatrick and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore, and Thomas Milner Harrison both of the city of Auckland, in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the

Colony of Tasmania and whereas the said Company have by contract entered the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now these presents witness*eth*

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (5000) five thousand pounds, of which the said Company shall own
8 (11/20) eleven twentieths, in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; and the said Company will not use the *the* said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said partnership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of (£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some
9 other district of the Compan*ie's* field of operations in exchange for the portion of the said (£2250) Two Thousand Two Hundred and Fifty Pounds taken by him, and the said Company reserve the right either at the suggestion of the partners in Tasmania or at their suggestion to send one of their own number or

some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) Two fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
A. E. POWTER,
By His Att'y, T. E. COWART.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of
W. C. ROBISON, *N. L.*

10 Endorsed: Circuit Court, First Circuit. Thomas Milner Harrison *vs.* J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Emerson. L. 4464—16/438. Amended Declaration. Filed June 13th, 1900, at 4:54 P. M. (Sig.) P. D. Kellett, Jr., Clerk.

11 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHY EMERSON, Defendants.

Assumpsit.

Defendants' Demurrer.

Now comes the defendants in the above entitled cause, by their attorneys J. A. Magoon, I. M. Long and Kinney, Ballou & McClanahan, and demur to the plaintiff's amended declaration filed herein June 13, 1900, and for causes of demurrer allege:—

I.

That there is a defect or non-joinder of parties defendant.

II.

That several causes of action have been improperly united.

III.

That the declaration does not set forth facts sufficient to constitute a cause of action.

IV.

That the Court has no jurisdiction of the subject matter set forth in the first count of said declaration, nor does said count allege juri-dictional facts.

V.

12 That the Court has no jurisdiction of the subject matter set forth in the second count of said declaration nor does said count allege juri-dictional facts.

VI.

That the plaintiff has failed to allege the existence in some other District than Tasmania of stock of the market value of Two Thousand pounds (2000).

VII.

That it appears by said complaint that said plaintiff and these defendants are co-partners in respect to the matters and things in said declaration alleged, and that no action at law will lie between said co-partners for such matters and things

VIII.

That the declaration is ambiguous, unintelligible and uncertain, in that it does not set forth the continuance nor the dissolution of the partnership relations created by the memorandum of agreement thereto attached.

J. A. MAGOON,
F. B. McSTOCKER,
L. C. ABLES, AND
DOROTHY EMERSON,
(Sig.) By Their Attorneys, J. A. MAGOON,
(Sig.) I. M. LONG,
(Sig.) KINNEY, BALLOU & McCLANAHAN.

Endorsed: Circuit Court First Circuit. Thos. Milner Harrison *vs.* J. A. Magoon, F. B. McStocker, L. C. Ables & Dorothy Emerson. Defendants' Demurrer. Filed Jul. 9, 1900. (Sig.) George Lucas, Clerk.

13 In the Circuit Court, First Circuit of the Territory of Hawaii, August Term, 1900.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, F. B. McSTOCKER, L. C. ABLES, and DOROTHEA EMERSON.

Decision on Demurrer.

This cause came before the court on hearing on the defendants' demurrer on Tuesday, July 31st, 1900, Messrs. J. A. Magoon, I. M. Long, Kinney, Ballou & McClanahan and H. A. Bigelow appearing for the defendants, and Messrs. Robertson & Wilder appearing for the plaintiff, and the plaintiff having also appeared in person; the court having heard the arguments of counsel orders that the demurrer be and it is hereby sustained.

Dated, August 17th A. D. 1900.

(Sig.) R. D. SILLIMAN,
Second Judge of the Circuit Court of the First Circuit.

Memorandum.

As to the first count, it being a count on a joint obligation I think that all the joint obligors should be joined as defendants as required by our statute, especially in the absence of any allegations in the complaint setting forth that J. E. Cowart, J. H. Kirkpatrick, George D. Moore, A. E. Powter and James Wolfenden are without the jurisdiction of this court. I do not believe it is necessary to raise

this point by plea in abatement setting forth that the parties
14 not joined are without the jurisdiction of the court.

As to the second count, I do not think it sets forth facts sufficient to show that any valid judgment has been rendered in the Supreme Court of New Zealand, Northern District; in that there is no sufficient allegation of the service of the process of the court upon the defendant or otherwise setting forth facts which show that said court, which is a court of a foreign jurisdiction, had any jurisdiction of the parties against whom said judgment is rendered.

I think on an inspection of the first count of the declaration and the written memorandum of agreement, attached to the declaration and made a part of the said count, it is apparent that a partnership relation was entered into between the plaintiff and the defendants named in the declaration together with certain other persons; and I think that there is no sufficient allegation contained in the declaration of such an accounting between the partners as would result in a specified liquidated sum due to the plaintiff which he would be entitled to recover in a suit at law. Such accounting ought to show that the item of £2000 was considered by the partners and that the defendants who are sued promised to pay the same as in an account stated.

I also believe that the allegations of the complaint are not so definite and certain as they should be made, especially with regard to the facts pertaining to the relation of the plaintiff and defendants, the agreemnt that was entered into between them, the accounting or the other steps that were taken to wind up the affairs of the partnership or to show how the partnership terminated if there was a final end thereof and also in regard to the obtaining of a judgment in the New Zealand Court I think all the jurisdictional facts should be averred.

(Sig.) R. D. S.

15 Endorsed:—Circuit Court First Circuit. Thomas Milner Harrison *vs.* J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothy Emerson. Decision. Filed August 17th A. D. 1900. (Sig.) P. D. Kellett, Jr. Clerk.

16 In the Circuit Court of the First Circuit, Territory of Hawaii, August Term, 1900.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, L. C. ABLES, F. B. MCSTOCKER and DOROTHEA EMERSON.

Assumpsit.

Exception.

Said plaintiff hereby excepts to the ruling made herein by Judge Silliman on August 17th, 1900, sustaining defendants' demurrer to

plaintiff's complaint herein on the ground that same is contrary to the law.

Dated August 21, 1900.

T. M. HARRISON,
(Sig.) By His Attorneys, ROBERTSON & WILDER.

The above exception is hereby allowed.

(Sig.) R. D. SILLIMAN,
Second Judge, Circuit Court, First Circuit.

Endorsed: Circuit Court First Circuit. Thomas Milner Harrison *vs.* J. A. Magoon, L. C. Ables, F. B. McStocker and Dorothea Emerson. Exception. Filed August 22, 1900. (Sig.) George Lucas, clerk.

17 In the Circuit Court of the First Circuit, Territory of Hawaii, February Term, 1900.

THOMAS M. HARRISON
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES and DOROTHEA EMERSON.

Assumpsit.

Plaintiff's Bill of Exceptions.

Be it remembered that the above entitled cause came on for argument on defendant's demurrer to plaintiff's complaint herein before Judge Stanley, on the 12th day of January 1900 at which time plaintiff asked leave to amend said complaint by attaching thereto a copy of the agreement therein referred to. The Court allowed the amendment and granted the defendants time to answer said complaint so amended as aforesaid.

That thereafter the defendants filed a demurrer to plaintiff's said amended complaint which was argued before and submitted to Judge Davis who on the 25th day of May 1900, sustained said demurrer. The plaintiff duly excepted to said ruling and the exception was allowed.

That thereafter, to wit, on the 5th day of June 1900, plaintiff filed a motion for leave to further amend his said complaint as in said motion set forth. Said motion having been granted and the amendment allowed the defendants filed a demurrer to the said complaint as so amended which said demurrer was argued before and submitted to Judge Silliman, who on the 17th day of August 1900, filed a decision sustaining said demurrer. That plaintiff duly
18 excepted to said ruling and decision on the ground that the same was contrary to the law, and the exception was allowed.

The record in the cause, including all pleadings, motions and papers filed herein is hereby made part of this Bill of Exceptions.

Dated, August 24th, 1900.

THOMAS M. HARRISON,
(Sig.) By His Attorneys, ROBERTSON & WILDER.

The foregoing Bill of Exceptions being conformable to the truth is hereby allowed. And I hereby certify that the record contains all the pleadings and papers necessary to a proper consideration of the case by the Supreme Court.

(Sig.) R. D. SILLIMAN,
Second Judge, Circuit Court, First Circuit.

Endorsed and Filed Aug. 27, 1900.

19 Supreme Court of the Territory of Hawaii, December Term, 1900.

T. M. HARRISON
v.
J. A. MAGOON ET AL.

HONOLULU, FRIDAY, *January* 4, 1901.

Clerk's Minutes.

Exceptions from Circuit Court, First Circuit.
Before Frear C. J. Galbraith and Perry JJ.
Robertson and Wilder and Harrison for Plaintiff.
Kinney, Ballou, McClanahan, Biglow and Magoon for Defendants.
Mr. Robertson reads the pleadings.
Mr. Biglow Argues.
Mr. Magoon Argues.
Mr. Harrison Argues.
At 4 P. M. the Court adjourns for the day.

SATURDAY, *January 5th*, 1901.

Mr. Harrison continues with his argument.
Mr. Robertson Argues.
Mr. Biglow Replies.
The Court takes the matter under consideration.

20 In the Supreme Court of the Territory of Hawaii, December Term, 1900.

THOMAS MILNER HARRISON
v.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES and DOROTHEA EMERSON *née* LAMB.

Exceptions from Circuit Court, First Circuit.
Submitted January 5, 1901.
Decided April 25, 1901.
Frear, C. J., Galbraith and Perry, JJ.

21 G., H., the defendants and certain other person- entered into a written agreement to form a copartnership to engage in a

certain business in Tasmania. In said instrument it was agreed, *inter alia* "that if at or before the expiration of a period of six months" from a certain date, "the said G. or the said H. is not satisfied with the condition of the said partnership business in Tasmania," certain of the partners "will give the said G. or the said H. stock of the market value to the amount paid by him of the 2250£ mentioned in clause 2 hereof in some other district of the company's field of operation in exchange for the portion of the said 2250£ taken by him."

The clause 2 referred to shows that G. and H. together paid 2250£ for a nine-twentieth interest in the partnership, and another clause that of this sum G. paid 250£ for a one-twentieth interest and H. 2000£ for a two-fifths interest. H. brought an action to recover damages for breach of the said agreement to deliver stock. Held, on demurrer,

Either G. or H. or both may, upon the happening of the contingency stated, recover damages, G. for the failure to deliver to him the stock named of the market value of 250£ and H. for the failure to deliver to him such stock of the market value of 2000£, that the said agreement gives neither to G. nor to H. the right to recover stock of the market value of 2250£ or damages for failure to deliver said last named amount of stock and that it is unnecessary for H. to allege in this case that G. has not sued for or recovered any of said stock or damages for failure to deliver the same.

In the said agreement the said promisors and not the promisees took the risk as to whether or not at the time of the happening of the contingency stated the stock mentioned would be in existence, and it it therefore unnecessary for the plaintiff to allege that such stock is or was in existence.

The statement in the declaration that plaintiff "made demand upon said partners that under the terms of paragraph 4 of
22 said agreement they should deliver to him stock," etc., is a sufficient allegation of a demand for such stock in accordance with the terms of said paragraph 4, to wit, in exchange for plaintiff's interest in "the partnership hereby formed," and of an offer to give such interest in exchange.

The said promise to deliver stock to the plaintiff was based upon a valuable consideration, to wit, the payment by the plaintiff of the sum of 2000£ and his agreement to proceed to Tasmania to conduct the business of the partnership.

Assuming that the language of the agreement is ambiguous as to what stock is meant and that this fact might prevent the maintenance of a bill for specific performance of the contract to deliver such stock, an action at law for recovery of damages may nevertheless be maintained because it appears from the face of the declaration that the defendants have failed and refused to deliver *any* stock and have thereby committed a breach of the agreement, giving the plaintiff the right to recover at least nominal damages.

While the present action is one between persons who are partners in a certain business, the plaintiff is not suing any partnership of which he is a member; the agreement sued on is an express personal

contract between individuals who are partners, but not in their capacity of partners, is wholly distinct from partnership affairs and does not involve the consideration or require the examination of the partnership accounts; and under the circumstances an action at law may be maintained.

On the subject of jurisdiction, it is sufficient to allege in a declaration on a foreign judgment "that at the time of said action and the rendition of the judgment hereinafter mentioned, the said court was a court of record in said City, having jurisdiction over the parties plaintiff and defendant, and also of the subject matter in and of the said action;" and this even though it appears by inference or otherwise from the face of the declaration that at the time of the
23 institution of the action in the foreign court or of the rendition of judgment therein, the defendants were non-residents. It is not necessary to allege more specifically that direct personal service was made or that the defendants voluntarily submitted to the jurisdiction of such foreign court.

Where a foreign court upon a joint cause of action renders judgment against some and not all of the joint defendants, such error in the proceeding, assuming, but not deciding that the judgment was erroneous, is at most a mere irregularity and not matter affecting the jurisdiction of the foreign court and therefore not open to review in an action on such foreign judgment.

An action on a judgment is, within the meaning of Section 1259 of the Civil Laws of 1897, an action arising out of an implied contract, and a count on such a judgment may, under said statute, properly be joined with a count on an express and entirely distinct contract between the same parties.

A Plaintiff may properly join in the same action a count on a foreign judgment and a count on the original cause of action (between the same parties) on which the foreign judgment was based and rendered.

The agreement to deliver stock first hereinabove recited is, in view of the language of the instrument which is quoted in full in the opinion, held to be a joint and several contract. Under Section 1222 of the Civil Laws of 1897, it is necessary to join as defendants in the action all of the parties to the said joint and several contract.

In an action on a judgment, it is necessary to join as parties defendant all the living judgment debtors, except those who are out of the jurisdiction.

24 *Opinion of the Court.*

By PERRY, *J.*:

This is an action of assumpsit wherein the plaintiff declares on two counts. In the first count, he claims of the defendants the sum of $10,000., with legal interest from March 10, 1898, for damages resulting to him by reason of the breach of a certain agreement entered into at Auckland, New Zealand on the 20th day of September, 1897, by the defendants and certain other persons, of the one part,

and one Alfred Edward Gilmore and the plaintiff of the other part. The agreement was in words and figures as follows:

"Memorandum of Agreement made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the —— said partnership being composed of the following members:—T. E. Cowart, J. H. Kirkpatrick and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Abies and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison, both of the City of Auckland, in the Colony of New Zealand, parties of the second part.

"Whereas the said Company have the exclusive right and title to the Hagey formulas for Alc-holism and Narcotism in and for the Colony of —— Tasmania and whereas the said Company have by contract entered the — day of May, 1897, with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

"Now these presents witnesseth.

"For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinbefore stated.

"1. That the Capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own (11/20) eleven-twentieths, in consideration of granting all their exclusive rights to use the remedies in the said Colony to the said partnership hereby formed; and the said company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; and the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said partnership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

25 "2. That the said Gilmore and the said Harrison have paid the sum of (£2250) Two Thousand Two Hundred and Fifty Pounds to the said Company for the other (9/20) nine-twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

"3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of (£40) Forty Pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said

Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

"4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said Two Thousand Two Hundred and Fifty Pounds mentioned in Clause (2) two hereof in some other District of the Company's field of operation in exchange for the portion of the said (£2250) Two Thousand Two Hundred and Fifty Pounds taken by him, and the said Company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

"5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two-fifths interest for which he has paid (£2000) Two Thousand Pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one-twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

"6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

"7. That the said Company reserves the right to dispose of a (1/20) one-twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

"In witness whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
" J. H. KIRKPATRICK.
" J. A. MAGOON.
By His Att'ys, J. H. KIRKPATRICK,
" T. E. COWART.
DOROTHEA LAMB,
By Her Att'y-, J. H. KIRKPATRICK,
" A. E. POWTER,
By His Att'y, T. E. COWART,
LEMUEL C. ABLES.
" FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
" J. WOLFENDEN.
" T. M. HARRISON.
" A. E. GILMORE."

Signed in the presence of
(Signed) W. C. ROBISON, *N. L.*

The plaintiff alleges that in pursuance of said agreement, on or about January 17, 1898, he left New Zealand and went to the
26 Colony of Tasmania for the purpose of managing and carrying on the business referred to in the agreement and that he did so manage and carry on the same at the city of Hobart in Tasmania from February 1, 1898, to March 1, 1898; that the business was not successful and that he became dissatisfied with its condition and on or about March 10, 1898, notified his partner to that effect; that on or about the last mentioned date, he made demand upon his partners to deliver to him under the terms of paragraph 4 of said agreement, stock of the market value of two thousand pounds in some district other than Tasmania of the field of operations of said partnership; that said demand has not been complied with either in whole or in part; that on or about March 1, 1898, he paid, transferred and delivered to the parties of the first part named in the agreement all funds, moneys and assets of said partnership in his possession, also an account of all disbursements and expenditures made by him for and on account of said partnership, and that said funds, moneys, assets and account were accepted and received by said partners as true and correct; and that at the present time no unsettled account or indebtedness exists between him and his said partners except as to this claim of two thousand pounds with interest and costs.

The second count is upon a judgment for $10,600, which, it is alleged, was recovered June 13, 1899, at the city of Auckland, N. Z., by the plaintiff against the defendants herein together with T. E. Cowart, J. H. Kirkpatrick and George D. Moore in the Supreme Court of New Zealand, Northern District. The other allegations are, that at the time of the said action and of the rendition of the said judgment the said Supreme Court of New Zealand was a court of record in Auckland, having jurisdiction over the parties plaintiff and defendant and also of the subject matter in and for said action; and that no part of the amount of said judgment has ever been paid.

27 To this declaration the defendants demurred on the following grounds:

"1. That there is a defect or non-joinder of parties defendant.

"2. That several causes of action have been improperly united.

"3. That the declaration does not set forth facts sufficient to constitute a cause of action.

"4. That the Court has no jurisdiction of the subject matter set forth in the first count of said declaration, nor does said count allege jurisdictional facts.

"5. That the Court has no jurisdiction of the subject matter set forth in the second count of said declaration nor does said count allege jurisdictional facts.

"6. That the plaintiff has failed to allege the existence in some other District than Tasmania of stock of the market value of Two Thousand pounds (£2000).

"7. That it appears by said complaint that said plaintiff and these defendants are co-partners in respect to the matters and things in

said declaration alleged, and that no action at law will lie between said co-partners for such matters and things.

"8. That the declaration is ambiguous, unintelligible and uncertain, in that it does not set forth the continuance nor the dissolution of the partnership relations created by the memorandum of agreement thereto attached."

The court below sustained the demurrer on several of the grounds named. The case now comes to this Court on exceptions which present the question of the correctness of said ruling and of the merits of the demurrer. Those objections will be considered first which go to *to* the merits of the action itself.

3 and 6. On behalf of the defendants it is contended that the plaintiff is not entitled to recover upon the present declaration inasmuch as he has not therein averred (*a*) that Gilmore has not recovered the 2250£ mentioned in paragraph 4 of the agreement or judgment therefor or that he has not instituted proceedings for such recovery, (*b*) that the stock in said paragraph referred to is or ever was in existence, (*c*) that any tender was made by him to the defendants of the stock held by him in the partnership at the time demand was made for the 2000£ of other stock, and because (*d*) it appears that the promise by the Company in that paragraph mentioned was without consideration and that it is therefore void.

28 (*a.*) The language of paragraph 4 is, in part, that "if * * * that said Gilmore *or* the said Harrison is not satisfied * * * the said Company will give the said Gilmore or the said Harrison stock," and from this it is argued that the remedy here provided for is in the alternative and cannot be taken advantage of by both men, in other words, that *either* Gilmore *or* Harrison may, if dissatisfied, receive the stock for the non-delivery of which the actions is now brought, but that not *both* of them may have such stock because that would be compelling the Company to deliver the same stock twice. This argument, though perhaps not expressed in these precise terms, necessarily involved the taking of the position that, upon dissatisfaction, either Gilmore or Harrison may recover the whole amount of stock, to wit, stock of the market value of 2250£. We believe that the agreement is not capable of this construction. Its language in this respect is clear and unambiguous. The undertaking is, upon the happening of the contingency stated, to "give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (2250£) said Two Thousand Two Hundred and Fifty Pounds mentioned in clause (2) two hereof * * * in exchange for the portion of the said (2250£) Two Thousand Two Hundred and Fifty Pounds taken by him." Clause 2 shows that Gilmore and Harrison together paid 2250£ for a nine twentieths interest in the partnership by the said agreement formed, and Clause 5 further shows that of this sum Harrison paid 2000£ for a two-fifths interest and Gilmore 250£ for a one-twentieth interest. The meaning and intention is clear that *both* Gilmore and Harrison are to have a remedy if they so desire, Gilmore to recover stock of the kind specified of the market value of 250£ and Harrison stock of the said kind of the market value of 2000£ The

remedy of each is independent of that of the other; the measure of recovery in each instance is expressly stated, and even if both become dissatisfied and conclude to exercise their rights, there
29 is no double recovery of the *same* and no double liability on the part of the Company.

(*b*) The defendants contend that it was the intention of the parties that the stock referred to should be delivered to Gilmore or Harrison only in event of its being in existence at the time of demand for it and that their, the defendants', undertaking must be understood to have been upon that condition, in other words, that "the Company" cannot be held to have guaranteed the existence of such stock at such time. The agreement was to deliver stock of the *market* value of 2000£. Had the word "face" been used in place of the word "market," that fact might have lent some strength to defendants' argument. In that case the plaintiff clearly would be taking chances with reference, at least, to the actual value of the stock. We must assume, however, that the words "market value" were used advisedly and with knowledge of the fact that they have a well-known signification and that at times they import something very different in amount from "face value." This language of the contract, in our opinion, discloses an intention on the part of the parties thereto that the plaintiff should, in the event of dissatisfaction, taking no chances at all, not even with reference to value, be reimbursed the amount of his loss—in other words, shows that the defendants, and not the plaintiff, assumed the risk as to the existence of the stock. The agreement under consideration, by reason of its language, is not one of the class to which that in Bowler *v.* Ahlo, 11 Haw. 357, belonged.

It is further urged (*d*) that the Company could not possibly have intended to guarantee the existence of stock of the market value of 2000£ or of any stock at all because there was no consideration for such promise and such an undertaking would therefore be unbusinesslike and improbably. We fail to perceive any force in this argument. So far as appears from the face of the declaration the "Company" contributed nothing to "the partnership hereby formed" other than the right to use in the Colony of Tasmania certain
30 formulas for the cure of alcoholism and narcotism and its proportional share of such small sum as was necessary to defray the expenses of entering upon the proposed business. The plaintiff, on the other hand, paid to "the Company" 2000£ in cash for his interest in "the partnership hereby formed" in addition to paying his share of the expenses just mentioned. In other words, Harrison paid the substantial sum stated in order to be permitted to join in the experiment about to be made of curing alcoholism and narcotism and in the profits, if any, derivable therefrom. That the result of the experiment and the success of the venture were regarded at that time by the parties themselves as highly problematical, is at once apparent from the terms of the agreement, and not only is it not to be wondered at but it is natural to expect that the plaintiff before consenting to put his money in a venture of this sort and to proceed to Tasmania to do the actual work of the part-

nership, should have obtained a stipulation securing to him the return of his money in case of failure and the placing of the parties in their original position. There is no unfairness to the Company in such an agreement if it was voluntarily entered into. The consideration for the promise was ample.

(c) It does not appear that the plaintiff held any certificate or other evidence of his share in "the partnership hereby formed" and the inference is that he did not. There was nothing tangible, then, which he could have tendered. It is averred in the declaration that the plaintiff became dissatisfied with the condition of the business, that he notified his partners to that effect and that he "made demand upon said partners that under the terms of paragraph 4 of said agreement they should deliver to him stock of the market value of Two Thousand Pounds (2000£) in some District other than Tasmania of the field of operations of said partnership." This is a sufficient allegation that the stock demanded was demanded in accordance with the terms of paragraph 4, to wit, in exchange for his intangible interest in "the partnership hereby formed." It
31 is in effect an averment of such a demand accompanied by an offer to give in exchange his intangible interest. Plaintiff did all that by the terms of the contract he was required to do in order to become entitled to the relief demanded.

It is also contended that the agreement, and therefore the declaration, is ambiguous and uncertain inasmuch as it is impossible to ascertain therefrom what stock is meant in Clause 4. Assuming, but not deciding, that the language in this respect is ambiguous, that fact might prove a serious obstacle to the maintenance of a suit for specific performance praying for the delivery of the stock itself; but such is not the nature of this case. The defendants have failed and refused to deliver *any* stock and the action is merely one for the damages resulting from such failure and refusal. Whatever stock was intended, plaintiff would be entitled to at least nominal damages, since the agreement was not, as already held, conditional upon the *existence* of the stock and since, therefore, there was a breach of the agreement.

The further objection is made that there is no allegation in the declaration that the attorneys-in-fact who signed the agreement for some of the defendants were duly authorized so to do. We think that the allegation that the defendants, naming them, entered into the agreement, is sufficient on demurrer.

4, 7 and 8. These grounds of demurrer are based on the fact that the plaintiff, Gilmore and the persons composing "the Company" became, by virtue of the agreement, partners in "the partnership hereby formed." The contention is that the present controversy is one between partners, relating to a partnership transaction, that there has been no final settlement or accounting between the parners, and that under the circumstances the plaintiff's remedy is in equity and not at law. The general rule undoubtedly is that "an action at law will not lie in favor of one or more partners or their repre-
32 sentatives against one or more copartners or their representatives upon a demand growing out of a partnership transac-

tion until there has been a settlement of accounts and a balance struck." 15 Encycl. Pl. & Pr. 1005. There are two reasons for this rule, one, that in an action against a partnership of which the plaintiff is a member, the plaintiff himself would also be a defendant inasmuch as he would recover, if at all, in part from himself or from a fund in which he had an interest, and that this would present a state of affairs as to parties not permitted at law, the other reason "is found in the inherent nature of the partnership relation and consists simply in the fact that prior to an accounting and settlement of the partnership affairs no cause of action exists between the partners founded solely upon partnership dealings, except an equitable action for an accounting and settlement of the affairs of the partnership;" (15 Encycl. pl. & Pr. 1008) in other words, prior to such settlement it cannot be said what, if anything, is due.

Neither of these reasons exist, and therefore the rule itself does not apply, in the case at bar. The plaintiff is not in any sense making himself a party defendant; he is not suing any partnership of which he is a member. The recovery which he seeks is solely from "the Company" or its members and not from "the partnership hereby formed." He has no interest in "the Company" as a member, or in its property (except the enforcement of the present cause of action), although its members are his partners in "the partnership
33 hereby formed." If he recovers judgment against "the Company" or any or all of its members, no property of his or in which he has any interest will become liable for the satisfaction of that judgment.

The allegation concerning an accounting contained in the declaration is really unnecessary. The cause of action is distinct and does not in any way involve a consideration of the partnership accounts or dealings.

We believe the law to be that "where the cause of action is distinct from the partnership accounts, and does not involve their consideration, or require their examination an action at law will lie thereon between the partners;" that "an action of law lies upon express individual and personal contracts between partners, and it is immaterial whether such contracts relate to the partnership affairs or are wholly distinct therefrom," and that "if partners, by an express agreement, separate a distinct matter from the partnership dealings, and one expressly agrees to pay the other a specific sum for that matter assumpsit will lie on that contract although the matter arose from their partnership dealings." (15 Encycl. Pl. & Pr., 1034, 1043, 1044 and 1048). These partners, in order to successfully launch, "the partnership hereby formed," entered into a preliminary contract whereby certain of them agreed to purchase the plaintiff's interest in the concern upon the happening of a certain contingency. The transaction was purely one between the individuals, not in their capacity of partners. Gilmore was not in any way concerned in the agreement as to the purchase of Harrison's interest, and Harrison likewise was in no way concerned in the agreement as to the purchase of Gilmore's interest. It is just as though one only of the partners had agreed to buy out Gilmore for a

specific sum, and another to buy out Harrison for another specific sum.

"If by the articles a continuing partner is, on dissolution,
34 to pay the retiring partner a specified sum, the latter may recover it at law, even though on adjustment of the accounts he would be debtor to the firm." 2 Bates on Partnership, 890. See also *Id.*, 874,889.

"So there may be special bargains between the partners, by which particular transactions are insulated and separated from the winding up; and a single partner be substituted in place of the firm. Such is the common case of a partner retiring and selling out his interest to the continuing partners, who assume the debts. The retiring partner can sue them at law for the purchase price of his interest, which they had agreed to give, or for the amount of any debt he has had to pay." *Ib.*, 891.

"The fact that the partnership affairs have never been adjusted even though an adjustment thereof would show a balance due the defendant from the plaintiff is no impediment to the maintenance of this action. The agreement is for the payment, in a certain contingency, of a specific sum of money by one party to the other in case of a dissolution of the partnership. The party who becomes liable under the contract to pay such money, is the debtor of the other party; and the latter may maintain an action against him therefore, without regard to the partnership relations formerly existing between them or the state of their partnership accounts." Read *v.* Nevitt, 41 Wis. 352, 353. See also Edens *v.* Williams, 36 Ill. 252; Wetherbee *v.* Potter, 99 Mass. 363; Edwards *v.* Remington, 51 Wis. 343.

(5) The allegation of the declaration on this subject is, "that at the time of said action and the rendition of the judgment therein, hereinafer mentioned, the said Court was a Court of Record in said City, having jurisdiction over the parties plaintiff and defendant, and also of the subject matter in and of the said action." This, in our opinion, is sufficient. It is an allegation of facts and not of law. To be sure, it is a brief, summarized statement of the facts, but the evidence showing those facts need not be set out in the dec-
35 laration. The statutes governing the New Zealand Court are merely a part of such evidence and will have to be proved at the trial in the same manner as any other fact. It appears from the face of the declaration that the present defendants were, at the time of the execution of the agreement, and are now residents of Honolulu, although, it also appears, defendant Ables was in Auckland at the date here first mentioned. It is argued that the inference is that all of the present defendants were residents of Honolulu and out of the jurisdiction of the New Zealand court at the time of the institution of the action and the rendition of the judgment, and that therefore the declaration expressly shows that, on the doctrine of Pennoyer *v.* Neff, 95 U. S. 719, the judgment is invalid for lack of jurisdiction by the Court in that action over the persons of those who are defendants in this action. It is unnecessary to decide at this time whether or not the New Zealand court could have acquired jurisdiction over these defendants, if absent, by constructive service by publication, for it may be that they were present, and that direct

service was made or that they voluntarily submitted to the jurisdiction. Such inference, if any, of the nature stated, as may arise out of the other averments of the declaration, is overcome by the positive averment that the New Zealand court did have jurisdiction over the persons of the defendants. Nor do the authorities cited, Galpin *v.* Page, 18 Wall. 350, 367, 368, and Wilbur *v.* Abbott 6 Fed. 814, as we understand them, go to the extent of holding to the contrary. The decision in Galpin *v.* Page was as to the validity and effect of certain decree introduced in evidence and collaterally attacked in a subsequent proceeding, and was not on demurrer. The Court there said: "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law. * * *

36 "The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. * * *

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree." The presumptions referred to are those which have been held to arise from a record of a court of superior jurisdiction which is silent as to the matters concerning its jurisdiction in the particular case. These quotations may be more in point at the trial after the record of the New Zealand court is proven in evidence. The language used recognizes the possibility already herein pointed out of a court acquiring jurisdiction over the persons of non-residents. The plaintiff in the declaration in the case at bar is not relying on presumptions but on an express allegation.

The report of the case of Wilbur *v.* Abbott, *supra,* does not expressly state whether or not the declaration contained any allegation on the subject of the jurisdiction of the court which rendered the judgment declared on, but the strong inference is that there was no such allegation. The decision holds that, it appearing that the judgment debtors resided out of the State when the judgment was rendered, "no presumption can arise that they were duly served with notice of the suit in which the judgment was rendered or that they appeared and answered thereto." The case is distinguishable from that at bar in the particular already pointed out, and the decision does not apply.

37 The citation from 2 Black on judgments, 875, makes clearer the distinction sought to be drawn between the case last referred to and that at bar. The plaintiff in Wilbur *v.* Abbott in framing his declaration, evidently relied on the rule stated by Black that, "in bringing suit on a judgment rendered by a court of

record in another State, it is not necessary for the plaintiff to aver that the court had jurisdiction either of the person or subject matter, or to set out the facts conferring jurisdiction; for jurisdiction is presumed to have existed until the contrary is clearly shown by way of defense to the action. It is proper, however, and perhaps necessary to allege that the court rendering the judgment was one of general jurisdiction, or a court of record, or to describe it in such terms that this fact may appear as a necessary inference." The court practically took the view that such a presumption was insufficient to sustain the pleading where it affirmatively appeared on its face that the defendants were non-residents; and Black in the same section says: "if, however, it should appear from the record that the judgment was against a non-resident, it seems that an exception must be made to the general rule." The plaintiff before us has recognized this exception, or, perhaps, that equally favorable presumptions, in pleading, do not attend the judgment of a foreign court as attend that of a court of a sister State, and has accordingly made an express allegation to avoid the difficulty.

Two decisions which, though arising out of the interpretation of particular statutes, are valuable for the light which they throw on the question of the sufficiency of such an allegation as that contained in this plaintiff's declaration, are those in the cases of Brownell *v.* The Town of Greenwich, 114 N. Y. 518, 527, and Fisher, Brown & Co. *v.* Fielding 67 Conn. 91, 102, 103. In the first of these, a case submitted under the Code, the agreed statement was that the county judge "duly adjudged, determined and ordered" to a certain
38 effect in certain proceedings, and counsel contended, as in the case at bar, that the facts giving the jurisdiction must be alleged and proven. The Court said: "The expression 'duly adjudged,' as used in the statement for the submission of this controversy, therefore, means adjudged according to law, that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction both of the subject-matter and of the parties affected by the judgment, including the defendant. A judicial officer has jurisdiction, when he has power to inquire into the facts, to apply the law and to pronounce the judgment. Any step in the cause or proceeding before him is necessarily the exercise of jurisdiction, and that step cannot be 'duly' taken unless jurisdiction exists. The final step, in particular, the making of the judgment, cannot be 'duly' taken unless all of the preliminary steps upon which it is based have likewise been duly taken."

Fisher, Brown & Co. *v.* Fielding, *supra,* was an action brought in Connecticut on a judgment obtained in England. The plaintiff simply averred that the foreign court "duly adjudged" that the defendant should pay to the plaintiffs, etc. Defendant demurred for want of allegations that the court in question had jurisdiction of the alleged action, or of the subject matter, or of the parties; or that the defendant had notice of the action, or was summoned to appear therein, or did in fact appear; or that there was any hearing or trial. On appeal, the Supreme Court of Connecticut said:

"The plaintiffs' complaint was drawn in the form authorized by

the Practice Book (No. 169, p. 107) in actions on a foreign judgment. In actions on a domestic judgment, the authorized forms (Practice Book, No. 166 and No. 167, pp. 106, 107) state the fact, but not the manner of its recovery; but in declaring on the judgment of a foreign court, the approved averment is that such court, in an action therein pending between the plaintiffs and the defendant, duly adjudged that the defendant should pay to the plaintiffs the sum in question. No court can 'duly' adjudge such a payment, except in an action conducted in due course of law. Due course or process of law, with respect to such a judicial proceeding, necessarily involves reasonable notice to the defendant of the institution
39 and nature of the action, given (unless this be waived), if he be a non-resident, by personal service within the jurisdiction, and a fair opportunity to be heard before a tribunal of competent jurisdiction. So much is due to every person from whom another seeks to recover in a judicial controversy before a court of justice. Pennoyer *v.* Neff, 95 U. S. 714, 733.

"In the case of a domestic judgment, it is unnecessary to allege that these conditions have been fulfilled, because our law requires it, and it is to be presumed that the law has been obeyed. In respect to a foreign judgment, nothing can safely be taken for granted, and the Practice Book has therefore provided a different form of complaint.

"The Practice Act was designed to simplify our legal procedure, and to abbreviate pleadings by the omission of all unnecessary allegations. The demurrer to the complaint, on the ground that it did not allege that the High Court of Justice, Queen's Bench Division, Birmingham District Registry, had jurisdiction of the action, or of the parties, or of the subject-matter, nor that the defendant had notice of its pendency, or was summoned to appear, was therefore properly overruled. These facts were the indispensable conditions of a due adjudication by the foreign court; and whatever is necessarily implied is sufficiently pleaded. Nor was it cause of demurrer that the complaint did not state that any hearing or trial was had. The averment as to a due adjudication implied that there was a fair opportunity for hearing; and that the defendant could not complain that he did not avail himself of it."

See also Wakelee *v.* Davis, 50 Fed. 522, 523, (1892) where, expressly referring to Galpin *v.* Page (1873) and Wilbur *v.* Abbott (1880) and following Brownell *v.* Greenwich, it was said: "But in the eleventh and twenty-third paragraphs the plaintiff alleges that said judgment was duly given, made and entered by said District court which, inasmuch as the defendant was shown to be a non-resident, was a proper and apparently necessary averment. * * * The averment that the judgment was duly entered was a sufficient statement of the facts, under the New York practice, to impliedly allege jurisdiction * * * The denial by the defendant of this allegation raises an issue of fact in regard to the existence of jurisdictional facts."

The plaintiff in the case at bar alleges with far more directness the matters which the court in the New York and Connecticut cases held

to have been averred by necessary implication in the expression "duly adjudged."

One other argument advanced against the second count, is that the cause of action in the New Zealand court was joint and not joint and several, that only a joint judgment against all the defendants
40 before that tribunal could have been correctly rendered, and that the judgment, inasmuch as it was not against all of the defendants jointly, is void upon its face. This, if erroneous at all, was a mere irregularity and not matter affecting the jurisdiction of the court, and therefore not now open to review.

2. It does not appear from the face of the declaration that the judgment of the New Zealand court was based upon the same original cause of action which is stated in the first count herein. Assuming that judgment arose out of an entirely distinct transaction between the parties and that therefore the present declaration sets out beyond any question two causes of action, the second ground of demurrer cannot be sustained. Section 1259 of the Civil Laws of 1897 provides; "The plaintiff in a civil suit may unite several causes of action in the same complaint, when they all arise out of: 1. contracts, express or implied; or " * * * (six other classes of actions are here named). "But the causes of action so united shall all belong to one only of these classes, and shall affect all the parties to the action, and shall be separately stated." In our opinion an action on a judgment is, within the meaning of this statute, an action *ex contractu, i. e.,* on the promise or contract implied by law to pay the amount of the judgment 1 Encycl. Pl. & Prac. 193; 1 Chitty Cont. 23; 1 Parsons Cont. 7; 2 Bl. Com. 465; Freeman on Judgments (3rd Edition), 217; 2 Black on Judgments, 848; Johnson *v.* Butler, 2 Ia. 535; Moore *v.* Nowell, 94 N. C. 270, 271; Stuart *v.* Lander, 16 Cal. 373, 375; Childs *v.* The Harris M'f'g Co., 68 Wis. 232, 233. The first count is on an express contract, hence there is no misjoinder.

Defendants contend, however, that it sufficiently appears by inference from the averments of the declaration, and the plaintiff during the argument in this court stated the fact to be, that the New Zealand judgment was rendered on the same cause of action now declared on in the first count. Even upon these facts the two counts
41 have not been properly joined. The plaintiff has simply stated his case in two different forms, and for the same reasons, no doubt, which ordinarily leads plaintiffs to allege two or more different counts describing the cause of action, *e. g.,* because of uncertainty as to whether or not one or the other of the counts is capable of proof. He can, of course, and expects to recover on one only. The tendency of courts at present is to regard the judgments of foreign courts of record as being just as conclusive between the parties as those of domestic courts of record, and there seems to be, in this view, no good reason for holding that the original cause is not merged in a foreign judgment while holding that there is such merger in the case of a domestic judgment. In neither instance, it scarcely need be noted, would there be any merger if the judgment was for any reason void, as, for example, for lack of jurisdiction in the court rendering the same, for such an alleged judgment would in

fact not be a judgment at all. While, therefore, it may appear to be inconsistent for the plaintiff to aver both the agreement and the judgment, that consideration alone will not prevent the joinder of the counts. At common law inconsistent counts could be joined, and it is only by statute in some states that the procedure is prohibited. It is not uncommon to find in the same declaration two or more counts which are, strictly speaking, inconsistent and which cannot all be true at the same time; but the practice is well established and is, moreover, founded on good reasons. In the case at bar, if plaintiff fails to prove the jurisdiction of the New Zealand court, the position will be that the original cause of action will stand intact for lack of a valid judgment to absorb it; on the other hand, if he does prove the former judgment to be valid and binding against these defendants,
he will recover on that and the original cause will be deemed
42 merged. The apparent inconsistency will have disappeared.

It would serve no good purpose to compel the plaintiff to bring an action first on the judgment and then, if that fails of proof, to bring a new action on the agreement. It is no hardship to the defendants to have both phases of the controversy disposed of in one action and it will further the ends of justice to permit this course to be followed.

See 5 Encycl. Pl. & Pr. 319, 321; Barton *v.* Gray, 48 Mich. 166, 167; Walsh *v.* Kattenburgh, 8 Minn. 101, 102; Snyder *v.* Snyder, 25 Ind. 401, 402.

(1) Non-joinder of parties defendant. Four or five persons other than those named as defendants in this action, were members of "the Company" and parties of the first part to the agreement sued on in the first count. The judgment declared on in the second count was rendered against three persons other than the present defendants. Is there a defect of parties defendant?

The agreement sued on (quoting from it) "witnesseth: for and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated;" and then goes on to specify the details of the contract. As we construe this clause, it is in effect as though the language used had been, that for the consideration stated "the parties of the first part do hereby, jointly and severally, make, with the parties of the second part, the following agreement of partnership." The contract made in the opening clause by the parties of the first part is joint and several, and the contract there made is that the details of which are specified in the succeeding clauses. If paragraph 4 stood entirely by itself, it would probably be construed to mean that the members of "the company" jointly were liable for the promises there set forth
43 to give Harrison certain stock upon the happening of a certain contingency. The paragraph, however, cannot, we think, be read by itself; it must be read in connection with the opening sentence above quoted, and if so understood the result is the finding that the promise in question was a joint and several obligation on the

part of the members of the company. This is the construction strongly contended for by the plaintiff himself.

Turning to our statutes, Section 1222 of the Civil Laws of 1897 provides: "It shall be necessary to join as defendants in a civil action *all* the joint and several, or joint makers of promissory notes, or drawers of drafts, bills of exchange or orders, or *joint* and *several* obligors, lessees, or *parties of the first* or second *part* to covenants, agreements and contracts, in suing for non-payment, non-acceptance, or non-fulfillment thereof, but it shall in no case be necessary to serve all the joint parties sued with process. Service of process upon one of several defendants at law, shall be legal service upon all for the purpose of appearance in court, and judgment may be entered against all such co-defendants thereon; provided, however, that no execution shall issue against the sole property of any joint defendant on whom process was not duly served as aforesaid." Clearly the express language of this statute renders it necessary for the plaintiff to join as defendants all of the parties of the first part to the agreement sued on in the first count. It is, however, contended that the statute must be read as subject to an implied exception in the case of parties out of the jurisdiction of the court, on the ground that the statute is only declaratory of the common law rule on the subject and that at common law the exception named existed. If the exception referred to existed at common law,—it is unnecessary to say whether it did or not—and if the statutory provision is to be construed as subject to the same exception, it can only be on the theory that the Legislature therein intended merely to declare the common law on the subject without modification. That this was not the intention of the
44 Legislature, however, is clear from the fact that under the terms of the statute a plaintiff may recover a judgment against all those jointly liable on a contract without having service made upon all of said partners who are resident within the jurisdiction. The latter certainly was not possible at common law. We know of no sufficient reason for declaring the statute subject to the exception contended for.

Judgment debtors are not within any of the classes named in section 1222. They are not "Parties of the first or second part * * * agreements or contracts," that language referring, we think, solely to those who have voluntarily entered into such agreements and not to those upon whom, though unwilling, the law casts an obligation to pay the amount of a judgment duly rendered against them. The requirements of that section, then, as to joinder of all the parties, do not affect this branch of the case. It is the common law rule that applies. At common law, in an action on a judgment, it was necessary to join as parties all the living judgment debtors excepting only those out of the jurisdiction, *U. S. v. Cushman,* 2 Sumner 313, 314; *Gilman v. Rives,* 10 Peters 298, 299, 300; 11 Encycl. Pl. & Pr. 1119, 1120. Any expression to the contrary in *Bowler v. McIntyre,* 9 Haw. 306, was *obiter dictum.* The common law rule, subject to the exception stated, governs in this case. The plaintiff must make all the judgment debtors parties defendant or show an excuse for not doing so.

The New Zealand judgment having been recovered against seven only of the parties of the first part to the agreement, the foregoing decision will, in view of the provision of section 1259 that "the cause of action so united shall * * * affect all the parties to the action" render it impossible, we think, for the plaintiff to join the two counts in one action.

In our opinion, the demurrer was properly sustained upon
45 the first ground, but not upon the other grounds. Accordingly the exceptions are overruled and the case is remanded to the Circuit Court of the First Judicial Circuit for such further proceedings as may be proper not inconsistent with the foregoing views.

(Sg.) W. F. FREAR.
" C. A. GALBRAITH.
" A. PERRY.

ROBERTSON & WILDER,
For the Plaintiff, who also Appeared in Person.
MAGOON & THOMPSON,
KINNEY, BALLOU & McCLANAHAN, AND
H. A. BIGELOW,
For the Defendants.

46 In the Circuit Court of the First Circuit, Territory of Hawaii, February Term, 1900.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA EMERSON (née LAMB), T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEO. D. MOORE.

Assumpsit.

Amended Declaration.

To the Hon. A. S. Humphreys, First Judge of the Circuit Court of the First Circuit:

The undersigned, Thomas Milner Harrison, a foreigner by birth, plaintiff herein, claims of J. A. Magoon, F. B. McStocker, L. C. Ables, Dorothea Emerson (*née* Lamb), also foreigners by birth, residing in the Territory of Hawaii, and T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden and Geo. D. Moore, non-residents of said Territory, defendants herein, the sum of ten thousand ($10,000) dollars with legal interest from March 10th, 1898, for damages resulting to him for injury done by said defendants, and for cause of action alleges:

That prior to and on the 20th day of September, A. D. 1897, the said defendants were carrying on business as copartners in the Colony of New Zealand and elsewhere under the firm name or style of The African Pacific and Indian Hagey Company.

That on the date last above mentioned, at Auckland, New
47 Zealand aforesaid, the said defendants entered into an agreement with the said plaintiff and one Alfred Edward Gilmore, a copy whereof is hereto attached and made a part hereof, whereby it was agreed that the colony of Tasmania should be the place or sphere of business under said agreement, and that the plaintiff should go to the said Colony and manage the business there.

That by paragraph 4 of said agreement it was provided that if at or before the expiration of six months from the departure of the plaintiff from New Zealand to Tasmania the plaintiff should be dissatisfied with the condition of the said business in Tasmania the defendants would give the plaintiff stock of the market value of an amount equal to the sum paid by plaintiff as a consideration under said agreement, that is to say, stock of the market value of Two Thousand Pounds (£2,000), in some district other than Tasmania of the field of operations of said partnership.

That in pursuance with said agreement, the plaintiff on or about January 17th, 1898, left New Zealand and went to Tasmania aforesaid for the purpose of managing and carrying on the said business and that he did so manage and carry on the same at the City of Hobart in Tasmania from the first day of February, 1898, to the first day of March, 1898.

That the business was not successful and the plaintiff became dissatisfied with its condition and so, on or about the tenth day of March, 1898, he notified the said defendants to that effect.

That on or about the said tenth day of March, 1898, plaintiff made demand upon said defendants that under the terms of paragraph 4 of said agreement, they should deliver to him stock of the market value of Two Thousand Pounds (£2,000) in some District other than Tasmania of the field of operations of said partnership.

That said defendants neglected and refused and still neglect and refuse to deliver said stock or any part thereof or the value thereof to the plaintiff.

48 Whereof plaintiff prays judgment against the defendants herein for said sum of Ten Thousand ($10,000) Dollars with interest as aforesaid and costs; and asks the process of this Court to cite the said defendants to appear and answer this complaint before a jury of the country at the August, 1901, Term of this Court unless otherwise sooner disposed of by judicial authority.

Dated May 20th, 1901.

THOMAS M. HARRISON,
(Sg.) By His Attorneys, ROBERTSON & WILDER.

(Sg.) ROBERTSON & WILDER,
Attorneys for Plaintiff.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

Personally appeared A. G. M. Robertson, who, being duly sworn, on oath deposes and says that the matters and things stated in the foregoing declaration are true to the best of his knowledge and belief.

Subscribed and sworn to before me his 20th day of May, A. D. 1901.

(Sg.) A. G. M. ROBERTSON.
(Sg.) J. A. THOMPSON,
Clerk First Judicial Circuit.

49 [N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of Agreement made this 20th day of September 1897, between the African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members:—T. E. Cowert, J. H. Kirkpatrick, and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore, and Thomas Milner Harrison, both of the City of Auckland in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right title to the Hagey formulas for Alcoholism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now These Presents Witness*eth:*

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own
50 (11/20) eleven-twentieths in consideration of granting all their exclusive rights to use said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said partner-

ship hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said company for the other (9/20) nine-twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of (£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania, the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some
51 other district of the Companies field of operation in exchange for the portion of the said (£2250) two thousand two hundred and fifty pounds taken by him, and the said Company reserve the right either at the suggestion of the partners in Tasmania, or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two-fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one-twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one-twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWERT.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWERT.
A. E. POWTER,
By His Att'y, T. E. COWERT,
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of
W. C. ROBISON, *N. L.*

Endorsed and Filed May 20, 1901.

52 Title of Court and Cause.

Answer to Amended Declaration.

Now comes the defendants, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothy Emerson (*née* Lamb), some of the defendants in the above entitled cause, by their attorneys Kinney, Ballou & McClanahan and Magoon and Thompson, and deny each and every allegation in the plaintiff's amended declaration contained.

Dated Honolulu, June 8, A. D. 1901.

(Sig.) KINNEY, BALLOU & McCLANAHAN.
(Sig.) MAGOON & THOMPSON.

Endorsed and Filed, June 8, 1901.

53 Title of Court and Cause.

Motion to Amend Answer.

Now comes J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Emerson, *née* Lamb, defendants in the above entitled cause, by their attorneys Kinney, Ballou & McClanahan, and move that they may be allowed to amend their answer in the above entitled cause by adding the following words at the foot thereof:

"And these defendants give notice that they intend to rely upon the defenses of fraud, illegality, release and payment."

J. A. MAGOON,
F. B. McSTOCKER,
L. C. ABLES, AND
DOROTHEA EMERSON (NÉE LAMB),
By Their Attorneys,
(Sig.) KINNEY, BALLOU & McCLANAHAN.

Endorsed and Filed Aug. 16, 1901.

54 In the Circuit Court of the First Circuit, Territory of Hawaii.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON ET ALS.

Transcript of Testimony.

	Di.	Cr.	Red.	Rec.	Recal.
Ables, L. C.....	1	48	72	79	98
Emerson, Mrs. D.....	79	88	94	97	
Harrison, T. M.....	105	128	181	183	

(The numbers enclosed in brackets thus ( ) are the numbers showing the bottom of the respective pages of the original Transcript of Evidence.)

55 In the Circuit Court of the First Circuit, Territory of Hawaii.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON ET ALS.

THURSDAY, *October* 29, 1903.

Testimony of L. C. Ables, Called for Plaintiff, Sworn.

Mr. ROBERTSON:

Q. Mr. Ables, in 1897, did you form a partnership in connection with the Hagey business with Mr. Magoon and others?
A. Yes, sir.
Q. Did you have written articles of association?
A. Yes.
Q. Have you an original copy of those articles?
A. I have not, no.
Q. Do you know whether there is any original copy in existence?
A. Here in Court I believe.
Q. What is that?
A. They were in Court before. I presume they are here now.
Q. And you had a copy. I will ask you to examine this document and see whether it is a copy of the articles of co-partnership of the African Indian and Pacific Hagey Co.
A. I think that is a copy.

Mr. ROBERTSON: I offer this in evidence.

Mr. MCCLANAHAN: We raise no objection because it is a copy; we object to it as incompetent, irrelevant and immaterial on the ground that George D. Moore, one of the alleged partners,
56 did not sign, therefore he was not in the partnership.

Mr. ROBERTSON: I submit that does not affect the status of the parties who did sign.

We offer to show, that, nothwithstanding that Moore did not sign as a matter of fact he paid his proportion of the capital in the Company and took part in the Company and operated with the other members as a corpartner with them, so that the mere failure to sign the Articles with them does not affect the Articles at all. As to those that did sign to become partners and operate under those Articles that they have signed, they certainly cannot say they were not partners. In addition to this, as I said, we propose to show that Moore put up his share of the capital and became a full-fledged partner in the concern, although he did not actually sign the Articles. This will be evidence of the objects of the copartnership.

Mr. McCLANAHAN: If the offer is made to show a ratification and participation in this partnership by Mr. Moore, and a ratification of these Articles, well and good, otherwise we want them stricken from the record if a ratification is not shown.

The COURT: That is your promise, as I understand it, Mr. Robertson.

Mr. ROBERTSON: Well we contend, contributing his share of the capital and participating in the business, naturally makes a ratification of the articles.

The COURT: With that promise the objection will be overruled. It may be received in evidence and marked Plaintiff's Exhibit "A."

Mr. MAGOON: Exception.

57 (Read in evidence:)

Mr. ROBERTSON:

Q. Do you know whether or not the partnership agreement there was signed upon the date mentioned, the 10th of April, 1897?

A. I cannot be positive of the date.

Q. It was about that date, was it?

A. About that time.

Q. You know where George D. Moore was at the time the Articles were signed?

A. He was in Auckland, New Zealand I was informed.

Q. Did you proceed to New Zealand?

A. Yes, sir.

Q. How long after the partnership was formed here in Honolulu?

A. I think the same day the papers were signed, or the following day.

Q. Did you meet George D. Moore in Auckland?

A. I did, he met us on the wharf.

Q. What if anything was done under and pursuant to these Articles of Copartnership?

A. We went to New Zealand—to Auckland, New Zealand, and started an institute, what was known as an institute.

Q. What position did you hold in the partnership?

A. I was secretary and treasurer.

Q. Did you keep the books?

A. Kept the books.

Q. Do you know whether or not George D. Moore contributed his proportion to the capital under this agreement?

A. The capital, I don't know, he was reported to have done so.

Mr. McCLANAHAN: I ask that that be striken out what he purported to have done.

58 The COURT: It may be stricken out.

Mr. ROBERTSON:

Q. Don't you know of your own knowledge whether he actually contributed the amount of $2062?

A. No, I don't. I know it is credited to him as his proportion on the books.

Q. He was credited with that proportion on the books?

A. The books show that. Whether it was given to him or whether he got it, I don't know.

Q. Well, you noticed that one clause of the partnership agreement here provided for the raising of a fund to start the business going?

A. Yes.

Q. You know whether or not George D. Moore contributed to the fund?

A. I know that he did.

The COURT:

Q. Well, you kept those books, Mr. Ables?

A. Yes, sir.

Q. By whose authority or under whose direction did you credit to Mr. George D. Moore the $2062, the amount that he subscribed under the Partnership Agreement?

A. If you notice it, the Articles, the stock is divided in this way. It would be the same as a man in the sugar plantation, if I were secretary and treasurer, I would be handling the stock books of these holders, but I wouldn't know who got these shares which would be——

Mr. ROBERTSON:

Q. How much was raised of this fund to start the business?

A. Without referring to my book, I cannot give the exact amount, but I think when it is converted into English money that it amounted to 512 pounds, something over $1020,—512 Pounds, something as it is in the book.

59 Q. To which George D. Moore contributed his proportion?

A. Yes, sir.

Q. Can you state whether or not George D. Moore received any share of the dividends or profits of the partnership that were divided among the partners?

A. It was receipted for, I don't think by him individually, I think by Mr. Cowert or Kirkpatrick.

Mr. McCLANAHAN: I object to that as irresponsive to the question and ask that it be stricken out.

The COURT: The motion to strike out is granted. Let the answer be stricken out.

Mr. McCLANAHAN: Exception.

Q. Where was George D. Moore at the time when division of any profits was made?

A. I am not positive but I think that it was during the—A dividend was paid during his absence from the Colonies when—at the time that he took a trip back to Texas, through Honolulu.

Q. And who represented him at Auckland?

A. His dividend was receipted if my—to the best of my memory by either Mr. Cowert or Mr. Kirkpatrick, I wouldn't say who; I have a copy of it in my book.

Mr. McCLANAHAN: I ask that that be stricken out as irresponsive to the question.

Mr. ROBERTSON:

Q. What book do you refer to?

The COURT: Just a moment. The motion is granted that the answer be stricken out.

Mr. ROBERTSON: Exception.

Q. What book do you refer to Mr. Ables?

A. Before I left there—before I turned over my books to
60 my successor, I had a copy made of all transactions of financial nature where I had received and paid moneys, more to keep for my own protection, a good thing to do, I had a copy, I had it certified to by an expert accountant as an exact copy and also had it certified before the American Consul Mr. K. He went over the figures with me, and at my request certified that it was an exact copy of the books.

Q. Without referring to that book Mr. Ables can you state who represented Mr. Moore at Auckland while he was absent?

A. I had no notification or any knowledge from any one only a power of attorney; I don't think that they did, but Mr. Cowert or Mr. Kirkpatrick, one or the other, receipted for his dividend.

Mr. McCLANAHAN: I ask that be stricken out as incompetent, irrelevant and immaterial and not responsive to the question, the portion about Mr. Cowert receipting for the dividend.

The COURT: That portion of the answer following the words "I don't think that they did" may be stricken out.

Mr. ROBERTSON: Save an exception.

Q. Irrespective of any written power of attorney was there any verbal understanding as to who was to represent Moore in his absence?

A. Not that I know of.

Q. Do you know by what authority you paid his dividend to Cowert or Kirkpatrick?

A. I know the circumstances under which it was done, how it was done.

Q. Will you state those circumstances?

A. As a matter of fact Mr. Cowert received this money or a portion if this money that was dividends; I mean he held the money

and stated to me that he had a draft for Mr. Moore, and
61 would receipt for his money, either Mr. Cowert or Mr. Kirkpatrick.

Q. He had what from Mr. Moore?

A. Either one, a receipt for his dividend, stated to me that they would send the money to him.

Mr. McClanahan: I ask that the statement of either Cowert or Kirkpatrick be stricken out as hearsay.

The Court: It is so ordered.

Mr. Robertson: Exception.

Q. Well, did either one or the other purport to have authority to receipt for Moore's dividend?

A. I don't think I questioned the authority, I considered I held the receipt of either one of them and held their receipt for money, and didn't question their authority.

Mr. McClanahan: I object to what the witness considered as an authority. And ask that it be stricken out.

The Court: It is so ordered.

Mr. Robertson: Exception.

The Court:

Q. The question propounded to you, Mr. Ables, was whether you knew either of these gentlemen, whom you have mentioned, had authority to represent George D. Moore?

A. I didn't know it.

Mr. Robertson:

Q. Will there be anything in this book of yours that might refresh your memory on that point?

A. That book will tell me whether it was Mr. Cowert or Mr. Kirkpatrick that receipted for the money, which of the two.

Q. Would it refresh your memory as to how or by what authority they receipted for it?

A. No, I dont' depend on memory I depend on the signature.

Q. Depend on what?

62 A. Depend upon a copy of the receipt to know which one it was that receipted for it.

Q. Would that receipt show in what capacity the party signing was acting?

A. It is signed George D. Moore either by Mr. Cowart or Mr. Kirkpatrick.

Mr. McClanahan: I object to that and ask that it be stricken out. The receipt speaks for itself. There is no showing of any such receipt.

The Court: The motion is granted, the answer will be stricken out.

Mr. Robertson:

Q. Where is that?

A. I could not tell. It was in Court here yesterday, I think. It was left here from the previous trial.

Q. What kind of a book is it?
A. It is a thin memorandum book, something like a note book, thinner than that on your Honor's desk.
Q. Is this the book you refer to Mr. Ables?
A. It is.
Q. Do you find anything in there that will refresh your memory on these matters?
A. It doesn't refresh my memory, only it tells me who signed it, which one of the two, for Mr. Moore.
Q. I don't catch that answer?
A. It tells who signed form Mr. Moore. I said before in my answer that I didn't know whether it was Mr. Cowert or Kirkpatrick. I can tell you now.
Q. Do you know now?
A. It was Mr. Cowert.

Mr. McClanahan: I object to that as immaterial and ask that it be stricken out, there having been shown no agency between Moore and Cowert.

63 Objection overruled.
Exception.

Mr. Robertson:

Q. Was that on the books of the Company you know that Mr. Cowert was treated as a copartner.

Objected to as immaterial.

Mr. Robertson:

Q. State whether or not Mr. Moore knew that he was treated as a copartner on the books of the African Pacific & Indian Hagey Company?

Objected to as incompetent, irrelevant and immaterial.
Objection overruled.
Exception.

A. He received his share of the dividend.

Mr. McClanahan:

Q. What is that?
A. I say he was credited his share of the dividend and it was receipted for in the manner I have described.

Mr. McClanahan: I object to the answer and ask that it be stricken out as irresponsive to the question.
The Court: It is so ordered.

Mr. Robertson:

Q. Do you know whether or not George D. Moore ever saw the copartnership books?
A. The books that I kept, yes; I know that he did and had access to them.

Q. Did he know that his name was entered on those books as a partner?

A. Yes, sir, he could not have helped but have known that?

Q. Did he purport to be a partner in this copartnership?

A. Yes sir.

Q. Did he take any part in the copartnership affairs?

A. Not a very active part.

64 Q. Well, did he take any part?

A. He didn't do any work.

Q. What did he do?

A. Well he visited the Institute, associated himself with the patients at the Institute.

Q. Did he consult with the other partners as to the business of the concern from time to time?

A. Tried to.

Q. And hold himself out as a partner in the business?

A. Yes.

Q. He tried to, Mr. Ables, how did he try to?

A. Well, I would have to enter into a sort of explanation to explain that to your Honor. I will do it if you say so.

The COURT: I think you should make any explanation of that statement in order that the Jury may be fully advised as to what you consider he tried to do in connection with this copartnership.

A. Well, I will make a statement if your Honor desires it. Well, Mr. Cowert and Mr. Kirkpatrick, as we discovered after our association with them, were very peculiar men. They were men who took things in their own hands. They had the control of the stock, and they carried on the business notwithstanding Moore and myself protested against their methods, etc. They had the balance of power, That is the reason I made the statement that Mr. Moore tried to, as I did. We tried to advise with them about their manangement, but Mr. Cowart and Mr. Kirkpatrick took the matter in their own hands, and they made life very unbearable for both of us, particularly myself. That is what I mean by saying "we tried."

Q. Mr. Moore then participated in the management of the copartnership as much as any of the other copartners outside of Cowart and Kirkpatrick, is that correct?

65 A. No, he didn't have as active a part as either myself or Dr. Wolvington. Col. Moore was an old man, a man nearly 70 years old, and he was not a business man. I had the bookkeeping to do, and I had a good deal of work to do, while he did not. But Mr. Cowert and Mr. Kirkpatrick took matters in their own hands, and we were trying to be a balance power to them, and that is the fact of the matter, tried to hold them down; they were trying all the time to get rid of us, shake us, give us the shake.

Mr. ROBERTSON:

Q. Did Cowert and Kirkpatrick decline to follow advice given them in partnership matters by Moore?

A. They absolutely did just as they would have done if Col. Moore and I had not been there.

Q. Notwithstanding you tried to advise them, they would not listen to your advice, is that it?

A. We entered a protest and got ourselves into bad odor with them, simply that we were trying to fight them, that is, oppose their methods of doing business.

Q. State whether or not you held a power of attorney from F. B. McStocker in connection with this partnership business?

A. I held a power of attorney from Mr. McStocker.

Q. I would ask you wheher or not this is it?

A. That is the power of attorney under which I acted.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: I object to it as incompetent, irrelevant and immaterial, it not being a power of attorney which is broad enough to cover the act done in the premises by Mr. Ables for Mr. McStocker, namely: The signing of the contract sued on. It is so held by the Supreme Court.

Mr. ROBERTSON: The Supreme Court has already told us that we may show ratification.

66 We desire to put this in to show that it was ratified, and also the circumstances under which the agreement with Harrison was ratified. Not only that, but to show the relation that existed between Ables and McStocker at the time this contract was entered into.

It is admissible to show the relations existing between the principal and the party acting for him in cases of authority or without authority.

(The jury was here excused pending argument, after which they returned into Court.)

Mr. MCCLANAHAN: If the Court please we make further objection to the receipt of this power of attorney on the ground that no ratification has been shown, and we ask that it be admitted, if admitted at all, on the understanding that ratification of the contract will be shown by the plaintiff, otherwise that it be stricken out.

The COURT: Of course that is so Mr. Robertson. Of course if ratification is not shown, the Supreme Court having determined that this power of attorney gave no power to Mr. Ables to enter into this agreement on behalf of Mr. McStocker——

Mr. ROBERTSON: I understand that it is necessary for us to show ratification as to three of these decendants, yes, your Honor, Mr. McStocker and Mrs. Emerson.

The COURT: With that understanding, that the ratification of this agreement will be shown, the objection will be overruled.

Mr. MCCLANAHAN: Exception.

The COURT: The power of attorney now offered may be received in evidence and marked Plaintiff's Exhibit "B."

(Power of Attorney read in evidence.)

Mr. ROBERTSON:

67 Q. What plan was followed by the African Pacific and Indian Hagey Company in regard to doing business under its Articles of Copartnership, how did you operate your business?

A. First went to Auckland, after some weeks opened an Institute, treated patients, and endeavored to dispose of additional territory.

Q. What do you mean by disposing of additional territory?

A. Well, we got pretty—we held the entire islands of the Pacific and disposed of some portions of that, we made that effort.

Q. Well, how did you disp-se of territory, what do you mean by disposing of territory, you don't own any island there, did you?

A. Sold the right.

Q. Right to what?

A. Use this formula and conduct institutes. It is similar to a patent right I suppose.

A. In different parts of the country over which you had rights to sell, the Hagey formulas?

A. That was part of the purpose of the Company, that it was organized for.

Q. What is that?

A. I say it was part of the work that the Company organized for and what we endeavored to do.

Q. To sell the territory?

A. To sell the territory.

Mr. McClanahan: If the Court please I ask that the statement of the witness that it was part of the work of the Company to sell part of the territory, may be stricken out as incompetent, irrelevant and immaterial. The Partnership Articles are the best evidence.

Mr. Robertson: I am willing the last answer should go out.

The Court: The answer may be stricken out.

Mr. Robertson:

Q. Your Partnership Articles, Mr. Ables, state that you
68 copartners associate yourselves together for the business of administering the formulas known as Hagey Gold Cure and in the assignment and disposition of institutes organized for the purpose of administering said formula.

Now how did you proceed in the Colonies there, how did you proceed to carry out those objects of your Copartnership Articles?

A. Well, the first thing we did——

Q. What did you do?

A. The first thing we endeavored to do and — do, was to get a suitable place for carrying on this business, we rented a house.

Q. Yes?

A. And we advertised in the papers, interviewed leading citizens that we thought would be of assistance to us in establishing these institutes. We engaged a physician and we canvassed for patients and opened an institute.

Q. That was at Auckland?

A. Yes.

Q. Now you have referred to selling territory. How did you sell territory?

Mr. McClanahan: That has all been stricken out.

The Court: Yes. What else did you do?

(Last question read.)

A. How did we sell it?

(Last question read.)

A. Well, at the instance of Mr. Harrison we traded him a right to go down into Tasmania, the portion of the right for a run that he had with some sheep on it. That is one way. That is the way we did with him.

Q. Did you sell any other territory besides Tasmania?

A. There was an interest sold in New South Wales.

Q. To whom was this sale of territory in Tasmania made?

A. We traded with Mr. Harrison and Mr. Gilmore. We traded an interest to Mr. Harrison and Mr. Gilmore.

69 Q. Was there any written agreement with reference to this sale?

A. Yes, sir, there were papers drawn.

Q. I will ask you whether or not this is the contract that the Partnership made with Harrison and Gilmore (handing witness paper)?

A. There was—If the best of my memory serves me, three different documents with little alterations, I think that is one of them, the last one.

Q. I call your attention to the date, it is dated on the 1st of October. Do you recollect if that was the last one?

A. It is about 6 years ago—it is 6 years ago. They were changed from time to time, and to the best of my memory there were three of them similar, though I can't remember now whether this is the the first or last one.

Q. You can't identify this as one of them, can you?

A. Yes. Whether there was one before this or after that, I am not positive as to that, they were changed from time to time.

Mr. ROBERTSON: I offer this in evidence.

Mr. MCCLANAHAN: I object to it as incompetent, irrelevant and immaterial, purporting to be a contract with the African Pacific and Indian Hagey Company, a copartnership and there is no showing of authority in George D. Moore.

We object to it on the further ground that it purports to be signed by J. A. Magoon by his attorney- J. K. Kirkpatrick and T. I. Cowert; there is no showing of any signing of J. A. Magoon's name by J. H. Kirkpatrick and T. I. Cowert.

On the further ground that Dorothea Lamb's name is signed by Kirkpatrick and Cowert, who were not shown to have authority.

On the further ground that F. B. McStocker's name is signed by L. A. Ables, and no showing of any authority for signing this kind of a contract, that is introduced in evidence here, and was so

70 held by the Supreme Court.

On the further ground that it is a contract beyond the purview of the Articles of Copartnership of the African Pacific and Indian Hagey Company, in that it purports to deal in what are known as the Thompson formulas for the cure of alcoholism, formulas that are not shown to belong or have any relation whatever to the African Pacific and Indian Hagey Company.

On further ground that it recites and is signed by a man named Wolvington with whom the African Pacific and Indian Hagey Company are not shown to have had any business whatever or any connection.

On further ground that it is signed by A. E. Pouter by his attorney T. E. Cowert and -here is no showing of any authority to make that signature.

On the further ground that it purports to sell territory, which is a transaction beyond the scope of the contract, the business of the partnership being limited to the sale of institutes that had been established by the Company.

Mr. ROBERTSON: Of course we can't put in our whole case at once. We intend to put in further the power of attorney executed by Mrs. Emerson and J. A. Magoon to Cowert and Kirkpatrick. We also propose to show how Wolvington became associated with the Company and how they acquired the Thompson formulas.

The COURT: How about Pouter?

Mr. ROBERTSON: Pouter is not represented here and we contend that counsel has no right to make an objection that Pouter might make.

The COURT: This all goes in subject to your promise to show ratification.

71 Mr. ROBERTSON: To show ratification.

Objection overruled. Exception.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "C."

(Contract read in evidence.)

Mr. ROBERTSON:

Q. Under what authority did you sign F. B. McStocker's name to this agreement?

Objected to as immaterial. Objection overruled. Exception.

A. Under that power of attorney from Mr. McStocker which you introduced there, under that.

Q. What is that?

A. I signed it under the power of attorney that is introduced.

Q. This agreement states that Mr. Harrison has contributed 2000 Pounds Sterling as consideration to be paid by him in entering into this agreement?

A. It wasn't any 2000 Pounds.

Q. What was it?

A. It was a number of sheep and a sheep run or leasehold, a certain number of sheep on there that no one knew how many there were. There were sheep there, supposed to be, I never saw them.

Q. How was the arrangement made whereby Harrison was to contribute this sheep run and sheep?

A. Made through Mr. Cowert and Kirkpatrick.

Q. What did you have to do with making the arrangement?

A. A bill of sale was made to me, I sold the sheep.

Q. A bill of sale made in our name?

A. My personal name.

Q. Why was it made to your personal name?

A. Well, I will have to explain matters a little with ref-
72 erence to the Colonies, I think, to get to that. The rules of doing business there are a little different from here. I know that the money I kept in the bank I could not keep in the name of the Company, or L. C. Ables, Trustee, I had to keep it in my own personal name, and it was explained to me that it was easier to have it in my name than to have it in the name of the Company. They were disposed of for the Company. They were disposed — for the benefit of the Company.

The COURT:

Q. That was a mere matter of convenience, was it, Mr. Ables?

A. I took it as I say, that is the reason I explain this custom, it is easier to handle than if it had been in the corporation's. When I put the monies in the bank in Auckland I found if I put it in the name of the Company that I would have to have a number of signatures to each check to get it out to pay a bill. And I could not even put it in my own name as Trustee, as is done in this country, so I put the fund in my own personal name.

Q. Your attention is directed to this bill of sale?

A. In either matter, an easier matter to dispose of it.

Q. Both for the convenience of your copartners that the bill of sale was made to you personally——

A. For the purpose of negotiating the sale.

Q. For the convenience of the African Pacific and Indian Hagey Company?

A. Yes, sir.

The COURT:

Q. For the convenience of transacting the business of the copartnership?

A. It was put in my individual name.

Mr. ROBERTSON:

Q. Well, what was done with the sheep run and sheep that the partnership acquired from Harrison?

73 A. They were sold.

Q. For how much?

A. 500 Pounds.

Q. What was done with the 500 Pounds Sterling?

A. 500 Pounds Sterling.

Q. Equivalent to about $2500 in American money?

A. Yes, sir.

Q. What was done with that money?

A. It was put in the general fund.

Q. General fund for what?

A. For the partnership for which I was treasurer, secretary and treasurer.

Q. And what was done with that general fund?

A. A great deal of it was used in the general expenses.
Q. Yes?
A. Carrying on the business.
Q. Yes?
—. The majority of it was used that way, that is, most of the money.
Q. Yes? Was the general fund used for any other purpose?
A. We paid a dividend, one dividend.
Q. To whom was the dividend paid?
A. To the shareholders as represented according to my books, to the parties, either to them or their people representing them.
Q. Did each of the partners in the African Pacific and Indian Hagey Company share in that dividend?
A. To the best of my knowledge and belief they each got their money. It was not paid to them directly because they were not there.
Q. But it was allowed in the manner indicated in the Articles of the African Pacific and Indian Hagey Company?
A. Yes, sir.

74 Mr. ROBERTSON:

Q. In the proportion stated in the African Pacific and Indian Hagey Company Articles?
A. It was, yes, sir, as they existed at the time.
Q. What was done with the share of the dividend belonging to Mr. Magoon?
A. It was receipted for either by Mr. Cowert or Mr. Kirkpatrick.
Q. What was done with the share of the dividend belonging to Mrs. Emerson?
A. It was receipted for by one of those.
Q. Did you know that those gentlemen held powers of attorney from Mr. Magoon and Mrs. Emerson.
A. I did.
Q. What was done with the share of dividend belonging to Mr. McStocker?
A. I receipted for it, purchased a draft and mailed it to Mr. McStocker.
Q. Remitted it?
A. I did.
Q. You know how much it was?
A. I could not tell without referring to the book.
Q. Will the book refresh your memory?
A. It will tell me the exact amount charged to him and what the draft received would be.

The COURT:

Q. The cost of the draft?
A. The exchange, that would be the only difference.

Mr. ROBERTSON:

Q. You may refresh your memory?
A. 186 Pounds, 7 Shillings and 5 Pence.

Q. That was Mr. McStocker?
A. That was the amount of his dividend.

Mr. McCLANAHAN:

Q. 186 what?

A. 186 Pounds, 7 Shillings and 5 Pence. The draft may
75 have been—the exchange less than—I probably took out what it cost me for exchange.

Mr. ROBERTSON:

Q. Can you state what Mr. Magoon's share of that dividend was?
A. 466 Pounds and 4 Pence.
Q. And what was Mrs. Emerson's share?
A. 93 Pounds, 1 Shilling and 6 Pence.
Q. Can you state Mr. Ables', or I ask you do you know how Mr. McStocker received the remittance that you remitted him at that time?
A. I know that I wrote him a letter saying that I had sent a draft to the best of my knowledge and belief and I got a receipt from it,—an acknowledgment I would say, not receipt.
Q. I will ask you when was that remittance made to Mr. McStocker of that dividend?
A. 30th October, 1897, I think, ain't it? That is the date, October 30th.
Q. Have you any copy of that letter written by yourself to Mr. McStocker making that remittance?
A. I have not.
Q. Can you state whether or not you informed Mr. McStocker of the sources from which the funds were derived out of which these dividends were declared?
A. I can't state whether I did that mail or not. I sent the trial balances from time to time and statement, and kept the books.
Q. Did you send anything else besides trial balances to Mr. McStocker?
A. I didn't send him a copy of that agreement, I don't think.
Q. Well, you wrote letters to him, did you not?
A. I wrote to him.
Q. State whether or not you kept him informed of what the partnership was doing or your managers were doing in Auckland?
A. I wrote to him and kept him informed the best I could. I was not thoroughly informed sometimes myself.
Q. You were fully informed as to this contract were you not?

76 A. Yes, sir.

Q. You advised him fully as to that, did you not Mr. Ables?
A. Whether I advised him fully as to it, I don't think I did enter into details. I wrote him a letter and told him we had made a contract for some territory, for some sheep of uncertain value; I told him that, at least that is my recollection; I have no copy of the letter.

Q. Informed him that you traded territory for sheep?
A. Yes, sir, I have, I informed him to that effect.
Q. Mention the valuation?
A. Valuation uncertain, to the best of my knowledge and belief, because I don't know what it was worth,—there didn't *a-h*body at that time, that I could find out.
Q. Did you tell him the Company had taken them at 2000 Pounds?

Mr. McCLANAHAN: I object to that. The writing speaks for itself.
Mr. ROBERTSON: I ask you to produce it.

Q. I will ask you whether this paper headed memorandum signed by yourself, dated September 30th, accompanied the remittance of Mr. McStocker's share of the dividend, or was it with some other letter?
A. I don't think that is the one that came with the memorandum because this date—with the money——

The COURT:

Q. Don't what?
A. That didn't come with the money, because that is dated September 30th and the dividend was paid, as well as I remember October 30th.

Mr. McCLANAHAN:

Q. That is the letter called for by counsel, the letter referring to notification of the sheep deal?
A. There are different dates.

Mr. McCLANAHAN: We would like to have that read in evidence.
77 Mr. ROBERTSON: The witness says himself it is a different date.
Mr. McCLANAHAN: The witness says the dividend letter is a different date, but that is the letter you called for.

Mr. ROBERTSON:

Q. Can you tell Mr. Ables, whether that thing there is a complete letter?
A. I can't that is 6 years ago and over and I don't remember if that is a letter, if that is a letter of financial facts; it refers to the financial facts. There may have been another letter coming after it, I don't remember.
Q. If that was a complete letter it would be addressed to Mr. McStocker, wouldn't it?
A. That is marked memorandum up there on the top. It is a memorandum.
Q. Addressed to nobody. Well can you say whether or not you sent that to Mr. McStocker?
A. That is my writing. That is my memorandum.
Q. That is your signature?

A. That is my signature. And those are the facts as they existed on the books.

Q. And is that note dated October 2nd also your writing?

A. That is mine.

Mr. ROBERTSON: I will put this in evidence if your Honor will allow it in.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "D."

Q. What sale of Tasmania did you refer to in this letter, Mr. Ables?

A. The sale made to Mr. Harrison and Mr. Gilmore.

Q. What sheep are referred to in this letter?

A. The sheep that he traded us for that proposition.

78 Q. The Harrison sheep?

A. Yes.

Q. Are you able to state from that memorandum there whether anything else accompanied it, a trial balance or something else, for instance you refer to certain figures there?

A. It would only be a surmise of mine. I am not positive.

Q. For instance, the 250 pounds?

A. Well, that speaks for itself.

Q. Well, what 250 Pounds is that?

A. That refers to the 250 Pounds credited for Mr. Gilmore.

Q. Had you informed Ables of the Company getting 250 Pounds from Mr. Gilmore?

The COURT: Informed Mr. McStocker, you mean.

Mr. ROBINSON: Mr. McStocker, yes, certainly.

A. I referred to in that letter. I don't remember what further reference I made to it. I perhaps referred that it was on the trial balance.

Q. How often did you send trial balances to Mr. McStocker?

A. I would have to depend on my memory to answer that question, Mr. Robertson.

Q. Naturally.

A. I took a trial balance every month, had a trial b-lance and copied off one every month, and I sent them to him frequently, probably not every month, because some months there were practical-y very little addition.

Q. Well did you forward a trial balance every time there was anyt-ing of importance, that is, change of importance in the figures on the books?

A. It was my duty to keep him posted and I endeavored to do so to the best of my knowledge.

Q. Can you state whether you communicated, by any other letter or memorandum than the one read, to Mr. McStocker any

79 information in regard to the Tasmanian deal or the Harrison sheep?

A. It is a matter of memory with me. Mr. McStocker has got the letters, got some letters.

Q. You said, after selling the sheep, as I understood you and collecting the money, you reported to Mr. McStocker; is that so?
A. I sent him copies of the trial balances. The language that I used, the exact language of the report I can't remember.
Q. When I first showed you this memorandum, that has just been read, you said that is not the one. It is not what one?
A. You asked me if that was the one I wrote him when I sent him the dividend. I said that was not the one because that was dated September 30th and the dividend was paid October 30th.
Q. Did your letter that accompanied the dividend have anything to say about the Tasmanian deal of the Harrison sheep?
A. I would like to see what is in that letter, I have not seen it since that time, 6 years ago. Mr. McStocker has it.

Mr. ROBERTSON: I ask counsel to produce it.
Mr. MCCLANAHAN: I suppose that is the letter, the statement of the dividend is on it.
The COURT: What is the date of that Mr. Robertson?
Mr. ROBERTSON: October 29th.

The COURT:

Q. Cash is credited on October 30 and not the 29th, is that correct?
A. It says October 30th and there was only one dividend.

Mr. ROBERTSON:

Q. I would ask you if that is the letter, Mr. Ables, that accompanied the dividend sent to Mr. McStocker?
A. This is the letter.
80 Q. Is this typewritten memorandum any part of your letter?
A. No, that was not done by me. It looks familiar to me though I think Mr. McStocker's typewriter did that.
Q. This memorandum on the 3rd page of your letter is a part of the letter?
A. That is a part of the letter, it agrees with the books.

Mr. ROBERTSON: I offer this in evidence if the Court please.
The COURT: It may be received in evidence and marked Plaintiff's Exhibit "E."

Q. Who is this T. E. C. referred to in your letter?
A. Mr. Cowert, T. E. Cowert.
Q. And J. A. M.?
A. J. A. Magoon.
Q. And C. A. K.?
A. Kirkpatrick.
Q. Cowert and Kirkpatrick?
A. Cowert and Kirkpatrick.
Q. Did you write any other letter that you recollect of to Mr. McStocker referring or relating to the sale of Tasmania, of the Harrison sheep?
A. I have to depend entirely on memory as to what letters I wrote. I have no copies of them. I wrote him a lot of letters, but what

the contents of them are I don't know. Mr. McStocker has those letters.

Mr. ROBERTSON: I ask counsel to produce any other letters that they have referring or relating in any way to the Tasmanian deal.

Mr. MCCLANAHAN: There are none. We will produce if you want all correspondence passing between Mr. Ables and McStocker after the deal.

Mr. ROBERTSON:

Q. Did you correspond with Mr. Magoon at all, Mr. Ables?

81 A. I may have written him one letter. I don't remember having written him any. I may have written him one, and may have written two, I don't remember just now.

Q. I show you a paper headed trial balance, November 30, 1897, and ask you if it is in your handwriting?

A. This is in my writing, November 30, 1897.

Q. Will you state whether or not that is one of the trial balances you forwarded to Mr. McStocker?

Q. That is one of my trial balances, it is my writing, and it agrees with the books because I made it out. It looks familiar and I believe it to be one I sent over to him.

Q. It looks familiar?

A. I believe it to be one that I sent either to him or Mr. Magoon, I believe it to be one that I sent Mr. McStocker, it is just like a number of others that I sent him, similar to that.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: I object to is as not having been properly identified as having been sent to any one.

Mr. ROBERTSON: I propose to show, if counsel will not admit it, at the last trial counsel for defendant- produced this himself. In other words, coming from the counsel for defendants it is admissible against the defendants.

Q. Don't you remember seeing this trial balance on the last trial Mr. Ables?

A. No, I don't recall it to mind, Mr. Robertson.

Q. Don't you remember identifying that,—this is one of those you sent to Mr. McStocker?

A. If it was shown to me I testified it was one of my trial balances.

Q. Did you ever send that trial balance to Mr. Magoon?

82 A. I may have done so, but to Mr. Magoon I don't remember.

Q. You say you have written him one or two letters?

A. I wrote him one or two letters.

Q. You remember sending him any trial balances or other letters?

A. I don't say positively that I wrote, but think I may have written to Mr. Magoon.

Q. You don't think you enclosed him a trial balance?

A. Yes, I think probably I would, I don't know, I could not say. That is my trial balance, but whether I sent it to anybody I am not prepared to testify.

Mr. ROBERTSON:

Q. I will ask you this, Mr. Ables, whenever you forwarded a trial balance to Mr. McStocker state whether or not you also forwarded them to Mr. Magoon and Mrs. Emerson?

A. I did not, because I knew Mr. McStocker and Mr. Magoon were closely related and being in the same business I did not think it was necessary to send each and every one of them a trial balance, I don't think I should have done so.

Q. In other words, that one was sufficient for the three?

A. Yes, sir.

Q. Have you sent any trial b-lance to Mr. Magoon; and did you send a copy of that to Mr. McStocker?

A. I may have done so, but I don't think I should; I don't think I have.

Mr. ROBERTSON:

Q. Mr. Magoon, Mr. McStocker and Mrs. Emerson were all living here in Honolulu at the time?

A. All living here and closely related.

Q. Mrs. Emerson being in Mr. Magoon's employ?

83 A. She was in the office.

Q. In his office?

A. Yes.

Mr. MCCLANAHAN: I object to this as incompetent, irrelevant and immaterial.

Mr. ROBERTSON: I will undertake to prove it to be a fact that the trial balances were sent to and produced by the defendant-.

Objection overruled. Exception.

The COURT: The instrument may be received in evidence and marked Plaintiff's Exhibit "F."

(Here the Court after the usual admonition to the Jury took a recess until 1:30 P. M.)

Afternoon Session.

Direct examination of L. C. ABLES resumed:

Mr. ROBERTSON: When we adjourned I was about to read this trial balance.

(Trial Balance read in evidence.)

Mr. ROBERTSON: I also read the indorsement upon this paper as follows: "Defendants' Exhibit "2" T. M. Harrison *vs.* J. A. Magoon, *et al.* Trial October 8, 1901. A. J. "Kaulukou, Clerk."

Q. There is an item in this trial balance, Mr. Ables, of territory credited with 5045 Pounds. What does that item refer to?

A. It was a credit balance of an account that I called territory account for districts for money that we had received for interest in those districts.

Q. Those districts being Tasmania and New South Wales?

A. There was money received from Tasmania and New South

Wales. I don't remember whether there was any others in-
84 cluded in that account or not, but whatever money was received from territory was credited to Territory account.

Q. Were there any other sales of territory that produced proceeds, other than Tasmania and New South Wales?

A. They made a deal of New Zealand Territory there but I don't think there was any money.

Q. And whatever money came in and was credited to the account of territory was either from Tasmania or New South Wales or both, was it?

Mr. McCLANAHAN: One moment, unless counsel proposes to bring that knowledge home to some of the defendants, I don't know to which defendant that particular account applies, but there is no evidence to whom it was sent,—I object to it as incompetent, irrelevant and immaterial. It is attempting to show by this witness's statement what that is composed of by a means of ratification, by somebody who received it, when on its face it does not show what territory it covered at all. I object unless counsel proposes to show and shall ask to have it stricken out, unless it is shown that it was brought home direct to some of the defendants here, which one I don't know, or all of them. I object to Mr. Ables stating what the territory is that is included in that credit item, unless it be shown that that was made known to some of the defendants.

Mr. ROBERTSON: In connection with proving ratification, if the Court please it is necessary to prove, as counsel contended in the argument this morning, knowledge on the part of the persons whom we charge with ratification.

85 The COURT: The motion to strike out is denied.

Mr. McCLANAHAN: Exception.

The COURT: Objection overruled.

Exception.

(Last question read.)

The COURT:

Q. What is your answer Mr. Ables?

A. I don't understand the question yet, Judge, I don't understand the question, I don't understand the question yet.

(Last question read.)

A. Whatever sales had been made prior to that, that was the balance on that report, that trial balance; whatever sales had been made prior of any territory, that was the balance, credit balance, whether it was the Tasmania or any other territory.

The COURT:

Q. Well there was no other territory other than Tasmania or New South Wales at that time from which you did receive proceeds, was there, Mr. Ables?

A. I can't answer that question without consulting my books, that is 6 years ago, I can't remember.

Q. You have no independent recollection of it?

A. No. I know that statement is correct from the books but I cannot carry those things after six years.

Mr. ROBERTSON:

Q. You know whether or not any cash was received from the sale of any territory in New Zealand?

A. I am not positive of that. There may have been some small proportion of the cash——

Q. Were there any others than those three, than New Zealand, New South Wales and Tasmania?

86 A. I don't remember any at this time. The books show.

Q. In that letter to Mr. McStocker of October 2nd, 1897, you refer to Mr. George D. Moore coming up here to Honolulu. Do you remember whether or not he came at that time?

A. He did come.

Q. For what purpose?

A. I helped to put up his passage money with the understanding that he was to come back here and explain to the parties here the status of affairs better than I could write it.

Q. The transactions of the Company in New Zealand?

A. The general business, all appertaining to it.

Q. Do you know whether or not Moore did make such explanation to the parties here in Honolulu?

A. I only have his word for it.

Q. Did you see him after he returned again from Honolulu?

A. Yes, sir.

Q. To New Zealand?

A. I think I did.

Q. Now on your return to Honolulu from New Zealand, did you ascertain from Mr. McStocker or Mr. Magoon what information Moore had given them?

A. They said Col. Moore had been here and I think he complained that he did not make things very plain to them; that is my recollection.

Q. What else do you recollect that they said in regard to information acquired from Col. Moore?

A. They stated that he was not here but a short time, and they could not, they did not, the explanations were not very clear from him,—that is the sum and substance of it.

Q. Did they or either of them tell you that Moore had

87 spoken to them in regard to the sales of territory?

A. I don't remember any conversation appertaining to that.

Q. Did you receive any letters from either Mr. Magoon or Mr. McStocker dated subsequent to the arrival of Mr. Moore here, did they write you that Moore had arrived?

A. Yes, I think I heard from Mr. McStocker that he had arrived. In fact I am positive of that.

Q. Have you that letter?

A. No, I have no letters.

Q. What has become of them?

A. I destroyed all my private correspondence, and all the correspondence appertaining to the business, which was the business correspondence, I left there when I resigned and came away.

Q. So at the present time you have no letters received from McStocker?

A. I have none at all.

Q. Can you remember what McStocker wrote you with reference to the information acquired from Moore in regard to the Hagey Co.'s affairs?

A. To the best of my knowledge Mr. McStocker wrote me that he could not get much satisfaction out of the Colonel, did not understand him very fully.

Q. Anything else?

A. He may have written something else. That is the best of my recollection with reference to the visit of Col. Moore.

Q. Did they have anything to say in regard to the Harrison agreement, did Mr. McStocker have anything to say in regard to the Harrison agreement?

A. I do not remember that he did.

88 Q. Or the sheep transaction, anything with reference to the sheep transaction at all?

A. I can't call it to mind.

Q. He never returned the dividend that he received out of the concern, did he?

Objected to as immaterial.

Objection sustained. Exception.

Mr. ROBERTSON:

Q. You received your share of the dividend that was declared?

A. I did.

Q. And have retained it since?

Objected to as immaterial.

A. No it was spent a long time ago.

The COURT: Objection sustained.

Mr. ROBERTSON: Exception.

Q. When did you leave Auckland to return to Honolulu?

A. I got back to Honolulu in the month of March.

Q. Do you remember the date?

A. No, I don't.

Q. Don't you remember when you left Auckland?

A. I left Auckland sometime in January, I went to Sidney before I came away and sailed from Sidney to Honolulu.

Q. You came to Honolulu by way of Sidney, did you?

A. Yes.

Q. When did you leave Auckland then?

A. To the best of my remembrance sometime the latter part of January. I can tell from my book there when I took a receipt from Mr. Cowert for the balance, that will give the date practically Jan-

uary 24, 1898 I turned over the balance of the cash and took a receipt from Mr. Kirkpatrick and Cowert.

89 Q. And it was on or about that date that you left Auckland for Honolulu by way of Sidney, was it?

A. Yes sir, it was within a day or two of that date that I left for Sidney and then came from Sidney home. It cost no more to come from Sidney than it did from Auckland, fares are the same.

Q. What is that?

A. The fares to Sidney and from Sidney to Honolulu is the same as from Auckland to Honolulu. I bought a ticket when I went to Auckland for Sidney the price being the same, so I ran over there and came back here.

Q. And you arrived in Honolulu in the month of March 1898?

A. Early part of March, sometime about the 10th or pretty near the time I left, I know it was 11 months from the time I was gone, within a day or two, a few days.

Q. 1898?

A. 1898.

Q. On arriving here did you interview Mr. McStocker or Mr. Magoon or Mrs. Emerson, with reference to the Hagey Company business?

A. I made a report to them.

Q. Did you have a meeting together?

A. We met in the office together I think as well as I remember, yes, we talked the matter over.

Q. What information did you convey to them at that time in regard to the affairs of the Hagey Company?

A. I brought a statement of my affairs and this book and showed it to them.

Q. A written statement?

A. Well this is a written statement, this is a copy, a certified copy of all the transactions.

Q. You showed this book to them, did you?

A. Yes, sir.

The COURT:

90 Q. Who were present at that time?

A. Mr. Magoon and Mr. McStocker and myself talked the matter over.

Q. Was Mrs. Emerson present?

A. I don't remember.

Q. Where was the meeting held?

A. As I remember it in Mr. Magoon's office.

Mr. ROBERTSON: I offer this book in evidence, if the Court please.

Q. This is the book that you refer to as having submitted to your copartners?

A. Yes, sir.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "G."

Mr. ROBERTSON:

Q. At this conference you refer to was anything said with reference to the agreement with Harrison?
A. I don't think so, I don't remember.
Q. Anything said with reference to the sheep?
A. I cannot positively remember whether I explained about the sheep too or not.
Q. Did they ask you any questions about the sheep deal?
A. I don't remember whether we went into the details about the sheep.
Q. Was anything said as to what funds this dividend that had been remitted to them was composed of?
A. I don't remember that there was. They had a statement at the time it was signed by them.
Q. The statement that you sent them at that time showed how it was derived, did it.

Mr. MCCLANAHAN: The statement will speak for itself.

Mr. ROBERTSON:

91 Q. Please tell your counsel what statement you refer to?
A. When the dividend was sent, there was a statement came the same time.
Q. Please produce it.
A. Written statement, you mean?
A. Yes, sir.

Mr. MCCLANAHAN:

Q. Statement of what?
A. How this money was made up. You have it here this morning.
Q. It has been produced in evidence?
A. It was here this morning, letter shown to me.
Q. Has it been produced in evidence?
A. I think it was, yes.

Mr. MCCLANAHAN: The statement will speak for itself.

Mr. ROBERTSON:

Q. What do you refer to?
A. The letter that shows the amount that was refunded from the fund left over that was made up at Honolulu and the 18 per cent.
Q. Do you recollect about this letter of October 29th to Mr. McStocker?
A. I believe that is the date of it at the bottom there, it shows how the amount of 186 Pounds, is it not, is made up.
Q. It says here 18 per cent. dividend declared this day, that would be 162 Pounds?
A. Yes, sir.
Q. Is there any statement to show what constitutes the 162 Pounds?
A. I don't remember. I don't see how I could segregate one

money from the other. There was no financial statement of the Company ready.

Q. Where is that financial statement?

A. I could not tell you. I think you had it this morning.

92 Q. Do you mean this memorandum here? That doesn't show how that 162 Pounds, 18 per cent. dividend is made up.

A. It is made up of the amount of the capital stock which stood in his name.

Q. Fifty Per cent.?

A. No, that is a journal entry.

Q. Did you send any statement showing what money composed this dividend or out of what fund the dividend came?

A. I could not swear to that. If I sent any statements I have no copies of them. Here is an 18% dividend, and this is the portion that was taken for the fund that we started with.

Q. When you returned from New Zealand and had this conversation with Mr. Magoon and Mr. McStocker, was anything said with reference to what moneys composed the dividend that was paid out?

A. I don't remember the conversation we had.

Q. Well, can you remember—Did you have more than one conversation with Magoon or McStocker with reference to this?

A. I don't remember how many times we talked the matter over.

Q. As a matter of fact, you went all over the details of the transactions of the concern with them?

—. ——.

Q. All over each minor detail?

A. I don't think I ever went over them.

Q. Well, never mind the minor details; over the matter of the sale of Tasmania?

A. I don't remember.

Q. Did you go into that with them?

A. I don't remember that I did.

Q. Or the sale of the New South Wales?

A. I don't remember. I explained to them that Mr. Cowert and Mr. Kirkpatrick did most all the business.

93 Q. And you kept all the books?

A. I kept all the books from all the information that I could get.

Q. Well, you know all the parties to the deal with Harrison, don't you?

A. I didn't know all the parties of any deal. I got most of that as reported to me by Mr. Kirkpatrick and Mr. Cowert.

Q. The deal with Harrison was done in your name, was it not?

A. The papers were signed, I signed the papers, yes, but the details were arranged by Mr. Cowert and Mr. Kirkpatrick, they were the attorneys for Mr. Harrison.

Q. You knew the contents of that agreement with Harrison and Gilmore?

A. I thought I did.

Q. You read it before you signed it?

A. I read it, but it was explained to me different from what it seems it has turned out.

Mr. ROBERTSON: I move to strike out the last portion of the answer, the explanation.

The COURT: It is so ordered that the latter portion of the answer go out.

Mr. ROBERTSON:

Q. After you returned to Honolulu from Auckland did you receive a notice of suit brought against you and your copartners in the New Zealand court?

A. I was served with some papers here by Mr. Moot-Smith, relative to this same case.

Q. Have you got the paper that Mr. Smith served on you?

A. I don't think I have, I might have it in my office, I have not got it here, I think I have got a copy of it.

Q. Would you recognize a copy of it if you saw it?

94 A. Yes, sir, I think I would.

Q. Please examine this?

A. This looks like the paper, but I think Moot-Smith as attorney had something to do with it, I think his name is on the paper; this looks like it.

The COURT:

Q. At the time, Mr. Ables, that you had this conversation, in Mr. Magoon's office, with Mr. Magoon and other stockholders, immediately upon your return from New Zealand, did you or did you not at that time have a copy of this contract of the Hagey Company with Harrison and Gilmore?

A. I did not, I had nothing but that book.

Mr. ROBERTSON:

Q. You had a copy before you left New Zealand, had you?

A. I had a copy at the time I signed it.

Q. Well, you turned it over with the other papers to Cowert or Kirkpatrick, when you left Auckland, didn't you?

A. I turned over the papers I had, but I didn't have very many.

Q. Do you remember whether or not among the papers there was a copy of this agreement with Harrison?

A. I don't believe it was.

Q. Do you know how many copies were made, was it signed in duplicate, triplicate or what?

A. I think there were three. There were as many as three, possibly four.

The COURT:

Q. What disposition, if you remember, did you make of the copy you had?

A. Well, to explain that, I will have to go out a little bit.

95 Mr. Cowert and Mr. Kirkpatrick,—any papers that I made out from time to time, they borrowed one or two of them and

when they got all of them, they refused to give them back to me, they didn't want me to have them, I couldn't get them back; they took several papers and refused to give them back to me.

Q. And the copy that you had was taken in that way?

A. That is my impression that it was. I could not have got them back from them, there was no way to get them back from them, it absolutely would have taken force. They took several documents that way.

Q. In this agreement that was made with Harrison, I notice the name of J. Wolvington. Will you please state who J. Wolvington was?

A. J. Wolvington was a doctor, minister, that when we arrived in New Zealand we became acquainted with, found that he was there before we were, engaged in a business very similar to us, gold cure, they are all gold cures.

Q. What formulas, do you know?

A. He purported to use the Thompson formula.

Q. How did he become connected with the African Pacific and Indian Hagey Company?

A. After we had been there sometime and found out that Dr. Wolvington was in this line of business, Mr. Cowert and Mr. Kirkpatrick called on him, they became acquainted at least and after consulting with each other they decided to amalgamate the two interests by making one company and all working together.

Q. Well, you say, Cowert and Kirkpatrick made the arrangements. Did the African Pacific and Indian Hagey Company take Wolvington in?

A. They amalgamated.

Q. By an instrument in writing or what sort of an arrangement?

96 A. Yes, sir they entered into an arrangement.

Q. Have you a copy of that agreement?

A. No, I have not. I have a general entry in my books showing it, that is all.

Q. Do you know what became of the copy belonging to the African Pacific and Indian Hagey Company, of the agreement with Wolvington?

A. No, I do not. I think it went the way, the same way as a number of other papers.

Q. Please examine this paper and see if that is a copy of the Wolvington agreement?

A. Yes, I believe that to be a copy?

Mr. ROBERTSON: I offer that in evidence if the Court please.

Mr. MCCLANAHAN: I object to it on the ground that it is incompetent, irrelevant and immaterial, and shown to have been executed by Messrs. Magoon, McStocker and Pouter by powers of attorney; there is no showing in this case that any such authority as that existed and it is not an agreement that was within the purview or the powers of one partner to make for the partnership as to formation of a new partnership.

Mr. ROBERTSON: We contend we can show ratification if the Court please.

The COURT: With the same understanding as to previous testimony with reference to the agreement with Harrison and Gilmore?

Mr. ROBERTSON: Yes, your Honor.

Objection overruled. Exception.

The COURT: Let the instrument now offered in evidence be received and marked Plaintiff's Exhibit "H."

(Agreement between the African Pacific and Indian Hagey Company and J. Wolvington, read in evidence.)

97 Mr. ROBERTSON:

Q. On what authority did you sign Mr. McStocker's name on that agreement?

A. Under the power of attorney that I held from him.

Mr. MCCLANAHAN: Now, if the Court please, I ask that this be stricken from the records on the ground that Miss Lamb's name is not signed to it at all by power of attorney or otherwise.

The COURT: The motion to strike out is denied.

Mr. MCCLANAHAN: Exception.

Mr. ROBERTSON:

Q. Will you state please, Mr. Ables, whether or not Miss Lamb's name was signed to it by her attorneys in fact Cowert and Kirkpatrick?

Mr. MCCLANAHAN: I object to that. The instrument speaks for itself.

Mr. ROBERTSON:

Q. I mean the original, not the copy?

Objection overruled. Exception.

A. I can't remember. The documents will have to speak for themselves. As far as I am concerned that looks to me like a copy.

Mr. ROBERTSON:

Q. Never mind the document speaking for itself. Don't you know as a matter of fact that Cowert & Kirkpatrick signed for Miss Lamb and also Mr. Magoon?

A. I do not know if they signed for Miss Lamb.

Mr. MCCLANAHAN: We renew our motion to strike out from the files of record. George D. Moore, also one of the parties did not sign. The Company's name is not signed at all.

98 Motion denied. Exception.

Mr. ROBERTSON:

Q. State whether or not the J. Wolvington referred to in this agreement that has just been read, is the same J. Wolvington referred to in your trial balance?

A. The same person.

Q. State whether or not the introduction of Mr. Wolvington into the African Pacific and Indian Hagey Company caused a return of part of the fund which had been subscribed by the original partners to be returned to them?

A. Part of the original agreement—I think it says that was to be refunded when it could be taken out.

Mr. McCLANAHAN:

Q. What is that?

A. The original fund Mr. Robertson refers to is the fund we took away with us on the start.

Mr. ROBERTSON:

Q. Yes.

A. The documents tell us when that should be refunded. The agreement tells us when that should be refunded.

Q. Well with what were the original members of the partnership credited when Wolvington was taken into the firm?

A. With what were they credited?

Q. Yes?

A. They were not credited at all. Their capital stock shrank in order to take him in.

Q. That is his capital stock was reduced?

A. Yes, each one took off a certain amount and it was given to Dr. Wolvington.

Q. Didn't they get credit for that percentage that was taken off?

A. No, they didn't get credit for it. It was charged to the account. I don't call that a credit.

99 Q. Don't call it a credit? It was charged to their account and credited to Dr. Wolvington's, to make up his proportions, I think they were *permitted*.

A. Yes, sir.

Q. And the result of it was to reduce the liability of the original members to contribute the original capital that they had bound themselves to contribute, was it not?

A. I don't understand it that way.

Q. Well, when you started in, you original partners agreed to put up 500, didn't you?

A. It was divided, the amout of the stock, that is the entire capital stock of 105,000 was divided in the proportion as referred to in the agreement, in the contract partnership papers.

Q. So you regarded that then rather in the light of paid-up stock?

A. That is the amount that was credited to each partner when I opened the books.

Q. I don't understand it that way. Now after Harrison entered into this agreement with you, upon which this suit is brought, state whether or not he proceeded to Tasmania?

A. He was a long time getting away when he was reported to have gone to Tasmania.

Answer stricken out as not responsive.

Mr. ROBERTSON:

Q. Don't you know that Robertson started for Tasmania?
A. He started two or three times.
Q. Now after the first time he started did you address any letter to him at Sidney?
A. I think I did.
Q. State whether or not you sent anything with that
100 letter?
A. There was some medicines and documents that was sent with it, Mr. Cowert got them ready and I wrote that letter.
Q. What kind of documents accompanied the letter?
A. It came out in the trial the last time that there was instructions, I think they were *permitted.*
Q. And you forward- the medicines and instructions to Harrison, did you not?
A. I don't know as I forwarded them but I wrote a letter that accompanied them, to wit, about the same time.
Q. I will ask you if this is the letter you refer to?
A. I wrote that letter.

Letter offered in evidence.
The COURT: It may be received in evidence and marked Plaintiff's Exhibit "I."

(Letter read in evidence.)

Mr. ROBERTSON:

Q. This money that you forwarded to Mr. Harrison and referred to in this letter was that preliminary fund that was raised in accordance with your agreement with him to start the office in Tasmania?
A. Yes, sir that was the fund that was raised for that purpose.
Q. And the medicines that are referred to here are the Hagey remedies?
A. Yes, sir.
Q. And the instructions referred to here, instructions as to the treatment of patients by the Hagey system?
A. Yes, sir, I believe that is it. Mr. Cowert and Mr. Kirkpatrick did the shipping. I wrote the letter.
Q. With whom was the arrangement for the sale of the New South Wales territory made?

101 Objected to as immaterial.
Objection sustained. Exception.
The COURT: This contract includes nothing but Tasmania does it?
Mr. ROBERTSON: That is all your Honor.

Cross-examination of L. C. ABLES:

Mr. MCCLANAHAN:

Q. You say that Mr. Moore's proportion of the capital in the African Pacific & Indian Hegey Co. was credited to him on the

books. Do you know whether he paid anything into the Company?
A. For that amount that was credited to capital stock?
Q. Yes.
A. I don't know that of my own knowledge.
Q. You don't know it.
A. No.
Q. Where did you get that, from whom, the authority to
102 make that credit on the books?
A. According to the partnership papers that showed the interest that each individual had in the enterprise.
Q. And you took that as your sole authority for giving him credit on the books?
—. I took that as the memorandum dividing or making an entry on my books showing each man's interest, that and the information I had otherwise.
Q. What is this otherwise information?
A. I knew that I had paid in my money for my proportion for instance.
Q. You knew that you had paid in yours, and you knew Mr. Magoon had paid in his?
A. I knew that he was reported to have done so.
Q. Where was your money paid in?
A. Some of it was paid here in Honolulu, some of this, it was paid to this man Sutton in San Francisco.
Q. How do you know it was paid there, were you there?
A. I was there.
Q. How much was paid there at the time?
A. I could not tell you that.
Q. How much did you pay over?
A. I can tell you how much was paid in, I put in altogether, I don't know how much I put in before that.
Q. How much?
A. Eight thousand.
Q. Do you know how much was paid in at that time by Mr. Magoon, yourself and McStocker and Mrs. Emerson?
A. Mr. Magoon's share was 12,500. I didn't handle the money but that is the amount that he was credited for, and I took
103 it for granted he had paid it the same as I had.
Q. How was your money taken up there, do you know, by check?
A. Mr. Magoon sent the most of it up.
Q. You know in what shape it went up?
A. A draft. To his agent up there.
Q. How large was the draft, do you know?
A. I could not say positively.
Q. So that all you know about Moore's payments is the statement contained in the Articles of Copartnership?
A. They represented that that was his interest in the African Pacific and Indian Hagey Company.
Q. And that is all you know about his having paid that money into the concern?

A. I never saw the money.

Q. To whom was the money paid that constituted the fund for the carrying on or prosecution of the business in Australia?

A. I took charge of that fund.

Q. Where did you get that fund from Mr. Ables?

A. I got mine from my own bank account.

Q. Yes?

A. And if my memory serves me, that Mr. Magoon and Mr. McStocker paid theirs in in a similar manner. I added that up, that amount.

Q. Did Mrs. Emerson pay any?

A. I think Mr. Magoon paid it for her.

Q. Yes, who else paid in?

A. Mr. Cowert and Mr. Kirkpatrick.

Q. Paid their share?

A. Yes.

Q. To you?

A. I received the draft before I went away. I had it in my custody.

104 Q. Who else paid in?

A. Mr. Cowert and Mr. Kirkpatrick paid for the other members constituting the partnership. I held the money, when I went for, for each and every one of them, that is there was no delinquencies.

Q. Did Moore pay any?

A. He didn't pay it himself.

Q. Did Cowert pay it for him?

A. Either Mr. Cowert or Kirkpatrick.

Q. How do you know?

A. Because Mr. Moore was not here at the time and could not have paid it himself.

Q. How do you know that Mr. Moore through them paid it?

A. What is that question?

Q. How do you know that Mr. Moore through Cowert and Kirkpatrick paid you his proportion of the preliminary fund?

A. Well I know I received the money from one of them and it was represented as his proportion.

Q. So you don't know that Mr. Moore paid it through them?

A. They may have put it up for him unbeknown to him, I don't know.

Q. You don't know that Mr. Moore knew anything about the African Pacific and Indian Hegey Co. management at the time this money was paid?

A. He could not have known anything about it.

Q. Where was he?

A. He was in the Colonies or on his way there.

Q. The arrangement then was made without his knowledge?

A. Made without his knowledge.

Q. Then this fund was advanced, if advanced at all, without his knowledge?

A. He could not have known it.

Q. How would it have been possible for Mr. Moore to have
105 advanced his part of the capital stock of the Company if he was away at the time the Company was formed?

A. He came here, was in the Hagey business here, and was represented as a partner then with Mr. Cowert and Kirkpatrick, and they represented that that was his interest. Of course I didn't talk with Mr. Moore.

Q. His interest in what?

A. In the business.

Q. I am talking about the African Pacific and Indian Hagey Company, now, that I understand was a company formed when he was not here?

A. Yes, he was not here.

Q. Well, then, how do you explain that Mr. Moore put in a certain proportion of that capital?

A. The African Pacific and Indian Hagey Company papers recited that each one's interest was a certain amount, and at that time I was not so well acquainted with Mr. Moore, Cowert, and Kirkpatrick as I was afterwards and I took it for granted that it was right.

Q. But you knew that Mr. Moore at that time was in Australia?

A. He was not here, he was away.

Q. Was not here?

A. No.

Q. Did Mr. Moore ever sign his name to any papers of the copartnership in this Company?

A. Not to my knowledge. I know that he refused to sign everything generally.

Q. He was solicited to sign was he not by Cowert and Kirkpatrick?

A. Yes, sir.

Q. And refused to sign?

A. Refused to sign any document.

Q. Never signed anything?

A. Never signed anything.

Q. Never signed the document in this case?

A. No.

Q. And refused to sign?

A. He had capital——

106 Q. And yet he was one of the supposed partners in the African Pacific and Indian Hegey Company?

A. Yes.

Q. The consideration of this contract you say was a sheep run with some sheep?

A. Yes, sir.

Q. And it was put in your name simply as a matter of convenience?

A. Convenience of sale, yes, sir.

Q. The sheep belonging to the Company?

A. Belonging to the company.

Q. And not to you?

A. Not to me.

Q. Who were the sheep bought for, the Company, or traded in this matter for the Company?

A. They were traded for the Company.

Q. What did you do with the sheep and the run?

A. Sold them.

Q. How soon after the trade?

A. It was not a great while. I can tell by referring to that little book, but I cannot give the exact date without it.

Q. Well refer to the book please?

A. On or about October 12th, that is when I received the first payment, October 12, 1897.

Q. The contract was signed on October 1st?

A. Well, it was between October 1st and October 12th, that I was negotiating to sell and dispose of them, and I received a payment on October 12th.

Q. How much did you sell them for?

A. 500 Pounds.

Q. And you sold them for 500 Pounds, all that you receivd in the trade from Harrison?

A. Yes, sir.

Q. At or about the time of this contract did you know or learn the market value of those sheep or the value of them?

107 Objected to as irrelevant and immaterial.

Mr. McCLANAHAN: If we can show that the Company had no stock of the market value of 2,000 Pounds, or any other stock at all,—in other words, that there could be no specific performance of this contract, then it comes down to the payment of 2,000 Pounds in lieu of specific performance of the contract.

Objection overruled. Exception.

(Last question read.)

Objected to as hearsay.

Objection overruled.

A. Upon getting the papers the title of the sheep passed to me.

Q. Upon what?

A. Upon getting the bill of sale, so that I had a right to sell them, I immediately started out to dispose of them, to convert the sheep into money, and I did so by making inquiry of commission merchants and people who were likely to give me any information or put me on track of any sale, who lived adjacent to parts where the sheep were, having got the address of these people from Mr. Harrison.

Q. Having got what?

A. I got the address of these people that lived near the location, the place where the sheep were located, I got the address, Mr. Harrison kindly gave it to me. I wrote to them, and also asked Mr. Harrison if he could help dispose of them, and I made inquiry of the two largest firms, butcher firms or dealers in meat, etc., in Auckland, New Zealand, and found out that they were so far from Auckland it was impossible to get them there.

Mr. ROBERTSON: I have to interrupt and move to strike
108 out the answer of the witness on two grounds: first that it is irresponsive to the question; and second, that it is merely heresay so far as witness is concerned. It is absolutely incompetent.

The COURT: I think the motion to strike out should be granted, and it is so ordered.

Mr. MAGOON: Exception.

Mr. MCCLANAHAN:

Q. You say you sold these sheep for 500 Pounds?
A. 500 Pounds.
Q. Did you sell all you got from Harrison for 500 Pounds?
A. I did.
Q. Sheep run and everything. Who did you sell them to?
A. I pronounce it Robertson, but in that country they call it Robaison.
Q. Did you know who Robaison was at that time?
A. A gentleman who had been interested with Mr. Harrison and as a partner who had a sheep run adjourning or close to the sheep run.
Q. Was he interested in these sheep?
A. Not at that time.
Q. But had he been?
A. He had been interested as a partner with Mr. Harrison.
Q. In these sheep?
A. In these sheep.
Q. And that is the man that you sold them to?
A. That is the man that I sold them to.

The COURT:

Q. Was Mr. Harrison's interest merely a partnership interest in the sheep?
A. I know he had bought out Mr. Robertson, or Robaison, as they call it.
109 Q. Did you ever see the sheep?
A. Never did.
Q. Is that the same person that signed his name as a witness to that contract?
A. No.

Mr. MCCLANAHAN:

Q. When were these sheep sold?
A. 10th of October first payemnt was made.
Q. How much money was paid at that time?
A. 500 Pounds down.
Q. What became of that 450 Pounds?
A. Well that was paid later.
Q. When was that paid?
A. There was a note taken for the 400 and that note paid 21st of January, just a few days before I went away.
Q. First of January, 1898?

A. 21st, yes.
Q. 21st?
A. 21st.
Q. How much was the note for?
A. When it was paid it was $472.10——
Q. 472 Pounds?
A. $472.10, 10 shillings—the 22 Pounds and 10 shillings was interest.
Q. So you took 50 Pounds in cash and a note for 450 Pounds.
A. A note for 450 Pounds.
Q. And the note was paid on the 21st of January, 1898?
A. Yes.
Q. When Mr. Harrison went to Sidney, you sent him this letter with the instructions and also a remittance?
A. I sent him the letter and a remittance. Whether the letter of instructions—I think Mr. Cowert or Kirkpatrick mailed that. It is under separate cover.
110 Q. This remittance was for 110 Pounds was it not?
A. Less amount taken out for medicines.
Q. Letter dated October 12th, 110 Pounds. What was this 110 Pounds for?
A. It was our proportion of the fund that was established similar to the fund that was established by the partners when we left Honolulu.
Q. How much was the whole fund?
A. I could not say, that was our proportion, and they was to put up an amount in proportion to what their interests were.
Q. Who do you mean by "our?"
A. The balance of us persons other than Mr. Harrison and Mr. Gilmore and other persons.
Q. And they, Harrison and Gilmore, were to put up the balance in proportion?
A. Their proportion.
Q. So that at the date of this remittance to Harrison of 110 Pounds you had received only 50 pounds on the sheep run sold?
A. That is all, the note had not been paid yet.
Q. So that at that date you were really out 60 in cash on the trade from Harrison?
A. We paid more money up to that date than we had received on it.
Q. What?
A. We had paid out more than we had received on it.
Q. Was this dividend which was paid or which was declared of 18 per cent., declared before the 450 pounds became due and was paid?
A. Yes, sir, it was declared on October 30th, 29th or 40th.
Q. So that although this 50 Pounds had been received from Harrison you had paid out 110 Pounds on Harrison's contract?
A. Yes, sir.
111 Q. When the dividend was declared of 18 per cent.?
A. Yes, sir.

Q. How was this fund to start the Hobart business, Tasmania business, how was that decided upon, who decided it, the amount of it?

A. That was arranged between Mr. Cowert and Mr. Kirkpatrick as our managers, between Mr. Gilmore and Mr. Harrison.

Q. It was arranged between Cowert, Kirkpatrick, Gilmore and Harrison?

A. Yes, the amount of it.

Q. The amount of it?

A. Yes.

Q. Did you have anything to do with it?

A. I paid over our proportion.

Q. But I mean the arrangement of it?

A. No, I had——

Q. Settling of the amount?

A. Nothing to do with it.

Mr. ROBERTSON: I object to that as incompetent, irrelevant and immaterial and move to strike the answer out.

Motion denied. Exception.

Mr. MCCLANAHAN:

Q. Now you say, to the best of your knowledge and belief, all of the copartners of the African Pacific and Indian Hagey Company shared in this 18 per cent. dividend?

A. Yes, sir.

Q. How did you pay George D. Moore's dividend?

A. Paid to Mr. Cowert, I think Cowert receipted for it.

Q. You had no communication with Mr. Moore about the dividend?

A. No, he was not there.

Q. How is that?

A. He was not there at the time.

Q. How did you happen to pay to Mr. Cowert, because he wanted you to?

A. Mr. Cowert, as a matter of fact, paid it himself, he held
112 the money and give me what I was entitled to, for myself, I could not get my hands on it but he receipted for it, which, as far as the accounts were concerned, amounted to the same thing.

Q. So you don't know that Moore ever got the money?

A. I don't know whether he ever got it or not any more than I never heard he didn't get it.

Q. This dividend then as a whole was never in your hands?

A. No, sir.

Q. Whose hands was it in?

A. Mr. Cowert.

Q. And I understand he paid you your dividend and the dividend for your Honolulu copartners?

A. For Mr. McStocker?

Q. For Mr. McStocker?

A. Yes, sir.

Q. And that is all that you had to do with the money?

A. And the balance I took, I took his receipts for all of the money so as to balance my cash.

Q. But you never handled the money?

A. I did not.

Q. How was this dividend of 18 per cent. made up, what was it made up from?

A. It was declared from money in our hands at that time.

Q. What did the moneys—What sources did they come from?

A. Well, here is the cash book.

Q. Well, refresh your memory and tell us if you can?

A. I can't tell which individual—every individual dollar or pound or shilling, but the bulk of it came from the New South Wales territory.

Q. How much was the New South Wales territory sold for?

A. I don't remember the amount. I can tell the amount that should come into my cash book at that time. Here is the
113 entry of 4500 Pounds on October 30th, the same time the dividend was paid.

Q. Don't you know independently what the New South Wales proposition sold for?

A. My impression was 5000 Pounds.

Q. 5000 Pounds?

Mr. Robertson: We object to the question and move to strike it out.

The Court: It is so ordered.

Mr. McClanahan:

Q. What is your best recollection as to what it sold for?

A. 5000 Pounds. There is 4500 of it received there.

Q. Will you examine your—Can you state when the balance was received, if there was any receipt for the balance?

A. That is all I see here, everything that was received in my time as far as I could—that come to my knowledge, was on the books.

Q. Did you receive this 4500 Pounds?

Q. I received portion of it.

Q. Now answer the question, Mr. Ables?

A. No.

Q. Did you receive the 4500 Pounds?

A. No, I didn't actaully handle the money.

Q. What portion of the 4500 did you receive, actually handling the money.

Objected to as irrelevant and immaterial.

Objection overruled. Exception.

A. My cash was always correct. I either had the money or receipts, but as I have explained that in these dividends other than mine and Mr. McStocker's, why they gave me the receipts, as having received it, in lieu of the money. I didn't hold the money
114 but I had their receipts, but it was on the same day, to make my cash balance.

Q. Well, can you state what part of this 4500 Pounds you received in cash at any time?

A. Well, it would leave a difference between the two sides of the cash book, the dividends were paid the same day the entries were made of that 4500 Pounds.

Q. The dividends were what?

A. It was all one transaction, I entered what was received on one side and what was paid on the other.

Q. What is the date of that credit there 4500?

A. October 30th.

Q. October 30th, the same day the dividend was declared?

A. The same day.

Q. As a matter of fact, Mr. Ables, was not the dividend declared from the 4500 Pounds?

A. We could not have paid that dividend if we had not had that 4500 Pounds.

Q. Answer the question if you can; was it not as a matter of fact paid from the 4500 Pounds?

A. That was the 4500 Pounds that paid the dividend, that was the money.

Q. How much was the gross amount of the dividend?

The COURT:

Q. The aggregate amount paid out in dividends?

A. It is on that journal entry we had here this morning. I can't tell from that receipt because in addition to the dividend there is that money that was refunded, but I have got a journal entry here that will tell what it was. Here it is, 3780 Pounds.

Q. 3780 Pounds the gross amount of the dividend, and that was paid on the day of the receipt of the 4500 Pounds from the
115 New South Wales sale?

A. Yes, the same date.

Q. On the date of the payment of the dividend had you received anything from Harrison, the plaintiff, under this contract, any money other than the 50 Pounds?

A. No.

Q. And at that date you had paid out on account of that contract 110 Pounds?

A. 110, the same date.

Q. You have spoken Mr. Ables of there being two or three contracts, or drafts of contract?

A. Yes, sir.

Q. Why were there two or three contracts?

A. Well it was an arrangement of Mr. Cowert's and Kirkpatrick's Mr. Gilmore and Harrison made the arrangement of the terms of the contracts; they were very similar.

Q. Is this contract which is in evidence the contract which you signed, does it contain the provisions that you signed?

A. The contract that I saw had my signature on it.

Q. I know that. I am speaking now of whether or no this contract which is in evidence with your signature on it, contains the conditions as they appeared on the contract when you signed it?

A. I contend they do not. I so swore in the last trial and so swear again. There is an alteration there.

Q. Will you take contract as introduced in evidence, the plaintiff's Exhibit "C" and state what was not in that contract when you signed it that appears in the contract there?

A. This interlining here in the fourth paragraph "at or before."

Q. "At or before" in paragraph 4 of that contract?

A. Yes, sir.

Mr. ROBERTSON:

Q. Interlined you say?

A. It has got a lead pencil mark under it.

116 Mr. MCCLANAHAN:

Q. What words do you say "at or before"?

A. Yes. So as to make it, it was to be six months instead of at or before.

Q. The contract you signed then was a contract which required Harrison to give it a trial for six months?

A. Six months.

Mr. ROBERTSON: I object to it on the ground that it is not the best evidence and move to strike it out.

The COURT: The motion is denied.

Mr. ROBERTSON: Exception.

Mr. MCCLANAHAN:

Q. Did you ever send to Mr. Magoon a copy of the contract that you did sign?

A. No, I did not.

Q. Did you ever send to him any contract that you signed with Mr. Harrison?

A. I don't think I did. If I have I never remember of doing so.

Q. Did you ever advise Mr. Magoon that you had signed a contract with Mr. Harrison?

A. No, I did not to the best of my knowledge and belief.

Q. Did you ever advise Mr. McStocker that you had signed a contract with Mr. Harrison?

A. I don't think I did.

Q. Did you ever advise Mrs. Emerson that you had signed the contract for her with Mr. Harrison?

A. I don't think so, I never did, I never wrote to Mrs. Emerson at all.

Q. Never what?

A. I never had any correspondence with Mrs. Emerson.

Q. Did you ever advise either Mr. Magoon, Mr. McStocker or Mrs. Emerson either in writing or verbal that you had signed a contract with Mr. Harrison?

A. I don't remember. If I have I have forgotten it.

117 Q. Do you know whether either of these three defendants ever knew that you had signed a contract with Mr. Harrison before the bringing of the Tasmanian suit?

A. The reference that I made to the contract there is all that I remember about.

Q. I call your attention to the fact that there is no reference to your having signed a contract in that?

A. I don't remember ever stating the fact of the contract.

Q. Did you ever advise either *three of these* defendants, Magoon, McStocker and Emerson, that Mr. Harrison had the power on or about 6 months from the date of his departure for Tasmania to become dissatisfied with the conduct of the Hagey business in Tasmania?

A. I did not.

Q. And demand from the Company stock of the market value of 2000 Pounds in some other field of the Company's field of operation?

A. I did not.

Q. Did you ever advise either of these three defendants Magoon, McStocker or Emerson that you had formed a partnership with Harrison?

A. I did not.

Q. Or with Mr. Gilmore?

A. Not——

Q. Or Gilmore or Harrison?

A. Not to the best of my knowledge and belief.

Q. Did they know prior to the summons in the Tasmanian suit that there had been a partnership formed?

Mr. ROBERTSON: I object to that as incompetent, irrelevant and immaterial and not within the province of this witness to testify.

Objection sustained.

118 Mr. ROBERTSON:

Q. Did they ever know to your knowledge or from anything that you have done or said that there was such a partnership?

A. Not to my knowledge.

(Here the Court after the usual statutory admonition to the Jury adjourned until tomorrow morning at 9:30 o'clock.)

119 In the Circuit Court of the First Circuit, Territory of Hawaii.

T. M. HARRISON
vs.
J. A. MAGOON ET AL.

OCTOBER 30, 1903.

Cross-examination of L. C. ABLES resumed.

Mr. MCCLANAHAN:

Q. I understand, Mr. Ables, that you returned to Honolulu sometime in March, 1898, and that at your return you had a talk with Mr. McStocker and Mr. Magoon relative to the status of the part-

nership affairs. Will you tell what matters relating to the partnership in this conversation you talked about?

A. My memory serves me that I talked more particularly about the financial affairs than about the conduct and relations of myself with Mr. Cowert and Mr. Kirkpatrick, the managers, that was the gist of the conversation, the management of the affair from the time we started until I got back, how we got along together.

Q. Why did you not talk about the Harrison matter?

A. Well it was a matter that was closed up, there was no occasion to talk about it, pau.

Q. Did you at that time consider that you were bound to guarantee the $10,000?

Mr. ROBERTSON: I object to the question on the ground that it is irrelevant and immaterial, it would be simply a conclusion of the witness as to his legal liability in the premises, a conclusion of law.

Objection sustained. Exception.

Mr. MCCLANAHAN:

Q. What were your reasons why you did not speak of it?

120 A. I——

Mr. ROBERTSON: I object to the question as irrelevant and immaterial.

Objection sustained. Exception.

Mr. MCCLANAHAN:

Q. You have stated that you made a report to McStocker and Magoon. At this time why didn't you report about the Harrison contract.

Mr. ROBERTSON: I object to the question on the ground that it has already been answered.

Objection sustained. Exception.

Mr. MCCLANAHAN:

Q. All of the notification or notice of this Harrison transaction Mr. Ables, that Mr. McStocker had prior to your coming here, was conveyed in letters, was it not, passing from you to him, was it not?

A. Yes, sir.

Q. Some of these letters have been introduced in evidence?

A. Some of them have.

Q. Can you state whether those letters are all the letters that were written by you which touched upon the Harrison matter?

A. I can't remember exactly what I wrote. The letters speak for themselves. Mr. McStocker has them. I don't remember any others.

Q. Is this one of the letters which you wrote prior to your departure for Tasmania to Mr. McStocker.

A. This is one of the letters which I wrote to Mr. McStocker.

Mr. MCCLANAHAN: I offer this in evidence for the purpose of proving practically a negative that it is one of the letters in the chain of correspondence that passed between Mr. Ables and Mr.

121 McStocker, and it is offered for the purpose of showing the whole chain of correspondence, for the purpose of showing

the whole of the notification, if any, that was made by Mr. Ables to Mr. McStocker.

Mr. ROBERTSON: I object to the evidence on the ground that it is irrelevant and immaterial and hearsay and not proper cross examination and is not bearing upon any matter brought out upon the direct.

Objection sustained. Exception.

Mr. MCCLANAHAN: I would like to have the paper received and marked for identification.

The COURT: It may be marked for identification as Defendants' Exhibit "1."

Mr. MCCLANAHAN:

Q. Is that a letter which passed from you to Mr. McStocker prior to your departure from Australia?

A. Yes, sir.

Mr. MCCLANAHAN: We offer this letter in evidence as a part of the chain of correspondence and in connection herewith we offer to show the whole of the correspondence passing between Mr. Ables and Mr. McStocker, for the purpose of showing the whole of the notice that was conveyed by these letters, of the Harrison contract. The letter is dated S-ptember 2nd.

Mr. ROBERTSON: We object to the evidence on the ground that it is irrelevant and immaterial and having nothing whatever to do with this case, and hearsay, because communication or correspondence between McStocker and Ables are not evidence against Harrison.

Objection sustained.

122 Mr. MCCLANAHAN: I ask that the letter of S-ptember 2nd 1897 be received for identification and marked for identification.

The COURT: It may be marked as Defendants' Exhibit "2" for identification.

Mr. MCCLANAHAN:

Q. Is this, Mr. Ables, one of the letters written by you to Mr. McStocker before you left New Zealand?

A. It looks like, may be two or three—This is my writing, this is all my writing.

Q. Answer the question?

A. Yes.

Q. Is that your letter?

A. Yes, sir.

Q. One of the letters you wrote to McStocker before you left New Zealand?

A. These are all my letters.

Q. What is that?

A. That is my letter.

Q. To McStocker before you left New Zealand?

A. To McStocker.

Mr. McCLANAHAN: We offer this in evidence if the Court please for the same purpose that we offered Exhibits 1 and 2.

Mr. ROBERTSON: We object to this letter on the ground that it is hearsay, if the Court please and being a communication between McStocker and Mr. Ables which is not admissible against this plaintiff. It is hearsay and inadmissible.

The COURT: I think the objection on the ground that it is hearsay should be overruled and it is so ordered.

Mr. ROBERTSON: Exception.

The COURT: Let the letter now offered and read in evidence be received and marked Exhibit "3."

Mr. ROBERTSON: Did you read October 1st?

123 Mr. McCLANAHAN: September 30th.

Mr. ROBERTSON: There appear to be three letters there, there are three different documents here, if the Court please—August 31, one dated October 1st and one dated September 30th.

The COURT: My ruling was intended to apply only to that letter that touched upon the Wolvington matter.

Mr. ROBERTSON: We have a further objection to the letters of August 31st and October 1st, in that they are irrelevant and immaterial and improper cross examination.

Objection overruled. Exception.

(Mr. McClanahan reads Defendants' Exhibit "3" to the jury.)

Q. Will you please tell me if that is a letter that you wrote to Mr. McStocker prior to your leaving New Zealand with reference to the partnership business?

A. Yes, sir, that is my letter, dated the 26th November.

Mr. McCLANAHAN: I offer in evidence letter dated 26th December.

A. 26th November.

Mr. McCLANAHAN: November, 1897, from the witness, L. C. Ables to F. B. McStocker, on the same ground that the offer was made of Exhibits 1 and 2.

Mr. ROBERTSON: We object to the evidence on the ground it is irrelevant and immaterial, bearing upon no issue in this case and hearsay, because a communication between Ables and McStocker, and not proper cross examination. It doesn't relate to anything brought out on the direct.

Objection overruled. Exception.

The COURT: Let the letter accompanying statement or

124 trial balance be received in evidence and marked Defendants' Exhibit "4."

Mr. ROBERTSON: We offer a further objection to the reading of the letter on the ground that the trial balance is a thing as wholly complete in itself and is no part of the letter, that by itself is wholly complete; that even if the trial balance is admissible it doesn't make the letter admissible.

Objection overruled. Exception.

(Mr. McClanahan reads Defendants' Exhibit 4 in evidence.)

Q. Mr. Ables, these last items that we read, opposite the names

of these different parties, are those patients and receipts from patients?

A. They are what they owed at the time.

Q. Yes, but they are patients?

A. They were patients and amounts due from them.

Q. Who is that C. and K. referred to in this letter?

A. Cowert and Kirkpatrick.

Q. And J. A. M. is Mr. Magoon?

A. J. A. Magoon.

Q. When you say "We have had no fights lately" who do you refer to?

Objected to as irrelevant and immaterial and not proper cross examination.

Objection sustained. Exception.

Mr. McClanahan:

Q. In that letter who do you refer to when you speak about as "they"?

A. I could not answer that question without having the sentence read, I might speak of one party one time, and another, another.

125 Q. "The project which they got into and the one I would not sign"?

A. Mr. Cowert.

Mr. Robertson: I object to the question on the ground it is irrelevant and immaterial and move to strike the answer out as not proper cross examination.

Motion denied. Objection overruled.

Exception.

A. At first, Mr. Cowert and Kirkpatrick, the managers.

Mr. McClanahan:

Q. Plaintiff's Exhibit "D," letter from you to McStocker, dated October 2nd, reads as follows: "Dear Mac: At the last moment Col. Moore has decided to go to Honolulu and Texas. He will put things to you as they are." Put what things to you as they are?

A. I was referring to the condition of affairs as they existed at that time.

Q. Detail what they were?

A. Conditions that we were working under.

Q. Detail what they were?

A. Well it was with reference to the way Mr. Cowert and Mr. Kirkpatrick had taken things into their own hands and carrying on the business, from the fact that they had control of the stock they conducted the business as far as the business was concerned, the details of going into—they did it themselves, they had a majority and they carried it on in that line, they kept a great many of the facts, I considered, from us relating to these things, and they were disagreeable to me, in fact, so much so that we come to a clash; these matters—in fact, they had boasted to me that they had soured

Mr. Magoon on me and that he was to ask for my resignation and had been writing to McStocker putting these things to him,
126 and I concluded that Mr. Moore could relate the facts, he being on the ground there and knowing the conditions that we had, he could relate them better than I could refer to those things, the general extent of the business, the country, and the condition under which we were trying to do business.

Q. In the letter of October 29th being Exhibit "E" of the Plaintiff you say "I have got myself badly disliked with the parties here." Who do you mean by the parties here?

A. Mr. Cowert and Kirkpatrick.

Q. In the same letter you say there is no denying the fact that I am the one who is in the way and that I am the one they want to down if possible. Who do you refer to there?

A. Mr. Cowert and Kirkpatrick. I didn't approve of their way of doing business.

Q. Mr. Ables, when you sold these sheep and this sheep run for 500 Pounds, did you get all you could for it?

Objected to as irrelevant and immaterial and not proper cross examination.

Objection sustained. Exception.

Re-direct Examination of L. C. ABLES.

Mr. ROBERTSON:

Q. When did you say you received the 250 Pounds from Gilmore?

A. I can't give you the date. I will have to ask permission to refer to that book. The book shows.

Mr. MCCLANAHAN: I don't see how this is re-direct. It
127 is not material.

Objection overruled. Exception.

Mr. ROBERTSON:

Q. Answer the question please. The question was when.

A. The 250 Pounds was paid Mr. Gilmore 22nd day of September, 1897.

Q. And when was the first time you realized from the sheep?

Objected to as improper and not re-direct examination.

Objection overruled. Exception.

A. October 12, 1897, 50 Pounds the first payment.

Q. October what?

A. October 12, 1897.

Q. And the balance of the sheep?

A. January 21, 1898.

Q. Mr. Ables, do these dates that you have given here of the actual receipt of the money, represent the dates at which the items were placed to the credit of *the credit of* the territory, or was the whole amount placed to the credit of the territory before the cash was actually received.

A. I credited nothing, this is all through the cash book, I credited no cash until I actually received it.

The COURT:

Q. The receipts——

A. I didn't credit any cash until I received it. This is the day I received it.

Mr. ROBERTSON:

Q. Well can you tell them what items made up this item credit to territory on the trial balance of October 31, 1897, 5190 Pounds?

A. I would have to go over the books to figure it out. I charged territory with expense.

128 —. I refer to this item 44, territory, 5120, trial balance October 31, 1897?

A. I would have to state that I have not got a copy of the books as posted. This is a copy of the cash received. I would have to go over the books and post them from the time of the first receipts and charge up what was paid out, you understand, in order to arrive at that balance. This is a copy of the cash book, It is not a copy of the ledger, a copy of the trial balance.

Q. You have no copy of the ledger?

A. No, I could run through the account and take the debits and credits and I could satisfy myself as to that time, because the trial balance was always correct, just what particular items, you understand I have not a copy of the ledger; I cannot turn to the territory account; I did not copy the ledger, I copied the trial balance off each month in this book, and this is a copy of the cash book, cash received and cash paid out.

Q. When this agreement was made with Harrison and he transfer- to you his sheep run and sheep, didn't you credit anything to territory?

A. I did not, not until I got the money; I only credited the cash.

Q. Then you mean to say upon receiving the run and the sheep from Harrison, no asset to that effect appeared in the books of the Company?

A. It was sold a short time after—No there was no entry made opening up an account crediting up the sheep ranch.

Q. Well, when was the sale made?

A. To—Of the sheep?

Q. To Robaison, yes?

A. I can't tell positively what day it was made. I can tell the day the first payment was made.

129 Q. Well, was the sale made prior to the first payment?

A. Yes, there was an agreement before he paid anything down. The sheep was sold to him. He didn't pay anything on account until he had agreed to take the sheep.

Q. Well, did he give a note for the 450 Pounds?

A. He gave the note for the 450 Pounds?

Q. Well then the credit appeared upon your territory account when he gave the note didn't it?

A. I don't think so, no.

Q. It should have, should it not?

A. Not necessarily, it is just a matter of book-keeping.

Q. Even from the standpoint of book-keeping, when you received the note, it becomes an asset and should appear to the credit of some account, should it not?

A. That is customary in the mercantile business when you receive goods, receive a man's note, to make an entry right there, that is customary book-keeping.

Q. If there is no entry made then the books are incomplete, are they not?

A. Well, I should say the property of the Company, it was kept in the Company's effects, there was no secret about it, it was known there was a note, and as soon as the note was paid it went into the cash account. It did not go into the cash account until it was paid.

Q. If the books of the Company don't show all the assets of the Company they are incomplete are they not?

A. There are no other transactions, they did not show the assets, the truth of that did not appear on the trial balance until after January 1st, the trial balance did not show that we had that note.

130 Q. I would like you to find out for me, Mr. Ables, what this 5190 Pounds is made up of?

A. I can figure it out for I dare say but it will take some little time, because I would have to post the territory account clear through all this book, a person that understands books would realize that it would take a little time.

Q. How long would it take you.

A. I wouldn't like to say.

Q. Two hours?

A. I can do it in two hours. Give you the debits and credits and show you how I arrive at that balance. That is what you want to know?

Q. Yes?

A. At that date.

Mr. ROBERTSON: I would like to have that evidence if your Honor please.

Mr. MCCLANAHAN: Does the witness understand clearly what is wanted?

A. I do.

The COURT: Will you post up your books? Enough of it, sufficient of it, the territory accounts at least in order to show how that account is obtained?

A. I will make a statement of it.

Mr. ROBERTSON:

Q. Does that book show the different amounts received from territory?

A. It shows all the amounts I received and paid out on account of the different territories.

Q. Then it shows what the money is received for?

A. Yes, I have got it.
Q. Was New Zealand and New South Wales shown in that book?
A. Every item in this book for territory shows from whence it came.

131 The COURT:

Q. You will prepare that statement, will you Mr. Ables?
A. I will.
Q. You have stated that on arriving in Honolulu you did not talk to your copartners about the Harrison agreement because it was closed; did any of your partners refer—did any of your partners refer to the Harrison agreement?

Objected to as improper re-direct examination.
Objection sustained. Exception.

Mr. ROBERTSON:

Q. You have stated that the letter in reference to McStocker that Col. Moore would explain things, you have said that those things meant the financial affairs and your relations with Cowert and Kirkpatrick, and would also include the transaction with Harrison?
A. I don't think I ever said or intimated that Mr. Moore would explain the financial affairs so much as he would the details that we had and the status of the business there, because I kept the partners thoroughly posted on financial affairs better than Mr. Moore could have done it. I certainly never said that.
Q. You stated this morning that that was one of the things that you referred to in your letter here that Mr. Moore was going to discuss?
A. The financial parts that he could explain, could not have been any more complete than I would explain it in my statement.
Q. Referring to these things that you have referred to that Mr. Moore was going to explain to the people here in Honolulu, was the Harrison agreement included?
A. I don't think so. I never anticipated any occasion for referring to that, it was more particularly the New Zealand transaction, that is the one that brought the trouble.
132 Q. The New Zealand transaction?
A. Yes, sir.
Q. That brought about the disagreement between you partners that were down there in New Zealand?
A. That brought the trouble between us immediately after we went there.
Q. You had no trouble with each other over the Harrison agreement?
A. No, I don't think we ever had only words about that at all.
Q. And the value of Harrison's sheep cut no figure as far as the agreement being satisfactory to the Company was concerned, did it?
A. That was talked over amongst us the value of the sheep.
Q. And was satisfactory to you all there?
A. We did not care what the sheep were worth, it was to be 2000

Pounds simply as a matter of putting in something. Mr. Harrison insisted. We should have put in 5000 Pounds just as well.

Q. And whatever they were worth was satisfactory to you under the terms of the agreement?

A. Yes, sir, we had made a contract then like trading jack-knives, sight unseen.

Q. You traded a pig in a poke for another pig in another poke?

A. That is about the size of it, both got cheated I guess.

Q. When you returned to Honolulu did you bring any effects or property of the partnership with you?

A. Nothing whatever.

133 Recross-examination of L. C. ABLES.

Mr. MCCLANAHAN:

Q. What were those sheep worth?

Mr. ROBERTSON: I object to the question on the ground it is irrelevant and improper.

Mr. MCCLANAHAN:

Q. You say whatever they were worth was satisfactory to you. What were they worth?

Mr. ROBERTSON: I object to that on the ground it is irrelevant and immaterial and not within the knowledge of this witness. Objection sustained. Exception.

Direct examination of Mrs. DORATHEA EMERSON, Called for Plaintiff, Sworn.

Mr. ROBERTSON:

Q. Were you a partner in the African Pacific and Indian Hagey Company, Mrs. Emerson?

A. I was.

Q. Being the Dorothea Lamb referred to in the Partnership Articles?

A. Yes, that was my name formerly.

Q. State whether or not you gave Messrs. Cowert and Kirkpatrick a power of attorney to act for you?

A. Yes, I did.

134 Q. Have you the original of that power of attorney?

A. No.

The COURT:

Q. Where is the original, Mrs. Emerson, do you know?

A. I don't know where it is.

Q. To whom did you deliver it?

A. I think Mr. Cowert or Mr. Kirkpatrick took it.

Mr. ROBERTSON:

Q. I will ask you if you recognize this as a copy of it?

A. Well, I don't like to swear that this is a copy of it; I believe it to be a copy.

Q. Do you remember the date of the power that you gave Cowert and Kirkpatrick?

A. No, but I think it was the year they started for Honolulu—Australia.

Q. You knew Mr. Magoon signed the same power of attorney, did you not?

A. Yes.

Mr. ROBERTSON: I offer this in evidence.

Mr. MCCLANAHAN: We object to it if the Court please on the same grounds we objected to the exhibit of plaintiff's Exhibit "B," being the power of attorney from Mr. McStocker to Mr. Ables, and on the further ground that it is cumulative. Partnership powers are no less than or more than are granted under the power of attorney at the time.

Objection overruled. Exception.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "J."

(Plaintiff's Exhibit "J" read in evidence.)

Q. After Mr. Ables and Cowert and Kirkpatrick proceeded to New Zealand, did you receive any information from either of them in regard to their entering into a transaction with a man by the
135 name of Wolvington?

A. Mr. Kirkpatrick did write same something about Dr. Wolvington.

Q. He wrote you something?

A. Yes, sir, he did.

Q. I will ask you to look at this letter, and see if you identify it as having been received by you from Cowert and Kirkpatrick?

A. Yes, I think I do. Yes, that is the letter I received.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Objected to as irrelevant and immaterial and hearsay.

Objection overruled. Exception.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "K."

(Plaintiff's Exhibit "K" read in evidence.)

Mr. MCCLANAHAN: What is the date of that, Mr. Robertson?

Mr. ROBERTSON: October 30, 1897.

Mr. ROBERTSON:

Q. This letter says it encloses drafts in favor of Mr. Magoon for 466 Pounds and 4 Pence, less exchange rate, being a rebate on original assessment, and 18 per cent. dividend. State whether or not you delivered the enclosed draft to Mr. Magoon?

A. I delivered it.

Q. This letter also says that Cowert and Kirkpatrick have already written with reference to this Dr. Wolvington. Have you any prior letter than this referring to Dr. Wolvington?

A. I don't remember that the letter was to me personally. There

was a letter that did refer to Dr. Wolvington but I don't remember whether it was — me or whether it was to Mr. Magoon. The Letters always came to us together, and we answered them together.

136 Q. And any letter that was addressed to you was read equally by Mr. Magoon?

A. Yes, sir.

Q. Any *any* letter from them addressed to Mr. Magoon was read by yourself?

A. It was.

Mr. ROBERTSON: I ask counsel to produce that letter to Mr. Magoon or Mrs. Emerson prior to October 30th referring to Dr. Wolvington.

Mr. MCCLANAHAN: We have not any other than those that were introduced.

Mr. ROBERTSON:

Q. Do you recollect Mrs. Emerson what was said in this letter referred to by Cowert and Kirkpatrick about Dr. Wolvington?

A. It seems to me that they said that this Dr. Wolvington was down there preaching the cause of temperance, and they thought it was better to get him in with them rather than act independently, and so he had joined them in the Hagey Co.

Q. Did they inform you on what terms he had joined the Hagey Company?

A. I don't remember that they did.

Q. Do you remember ever any—I will ask you at about this time that you are referring to did you see or have access to trial balances of the Company's books sent up here by Mr. Ables?

A. I never saw and never heard anything about trial balances until this morning in Court. We were always asking for them but they never came to us.

Q. Did you ever ask Mr. McStocker to see his?

A. No, I did not know—no, I feel pretty sure that I did not, I did not know that he had received any.

Q. This letter says here "Mr. Ables will send you a statement of the business." Do you remember seeing that statement?

137 A. He never sent me one. I never had any communication with Mr. Ables.

Q. Did Mr. Magoon, do you know?

A. No, I am quite sure he had not.

The COURT:

Q. If there had been one sent to Mr. Magoon would you have seen it?

A. Yes, I would have seen it.

Q. But you did not see it?

A. No, I did not see it.

Mr. ROBERTSON:

Q. Don't you understand this passage in this letter Mrs. Emerson referring to the contract, to Mr. Magoon, of the sum of 466 Pounds

and 4 Pence, less exchange which you will please deliver to him, 61 Pounds on the original assessment, and 405 Pounds on Stock, 18 per cent. was paid on the stock, and Mr. Magoon's $12,500 investment was reduced 10 per cent. the same as yours and all the rest there, the 1/10 interest go over to Dr. Wolvington that we have written about,—don't you understand that to mean that Wolvington received a 1/10 interest in the business?

A. I understand that it now means yes, it should. I don't know that I took much notice of it at the time.

Q. You don't recollect this particular passage in glancing over the letter?

A. I don't understand you. Do you mean what I think this minute.

Q. No, when you had the letter in your hands?

A. When I first received it?

Q. No, this morning when you first looked at it?

A. Oh, just now?.

Q. It didn't refresh your memory in that respect?

A. Yes.

138 Q. But you understand now that that is what it was?

A. Yes, I understand now that that is what it was.

Q. And it is so clearly stated that you must have understood it when you first received the letter from Cowert and Kirkpatrick, was it not?

A. Yes, I suppose I did so understand it.

Q. I will show you this letter dated October 1st to Mr. Magoon from Mr. Cowert and ask you if you remember seeing it at the time that it arrived?

A. I must have seen it for I saw all the letters.

Mr. ROBERTSON: We offer this in evidence if the Court please.

Mr. MCCLANAHAN: I object to it as hearsay.

Objection overruled.

The COURT: It may be received and marked Plaintiff's Exhibit "L."

(Plaintiff's Exhibit "L" read in evidence to the jury)

Mr. ROBERTSON:

Q. Did you know Col. Moore who was concerned in this Hagey business?

A. A man came here calling himself Col. Moore.

Q. Did you become acquainted with him?

A. I don't call that an acquaintance. He came into the office and I may have spoken a few words to him.

Q. Didn't you know at that time he was interested in the Hagey Company?

A. Yes, I knew he was.

Q. When was it that you first saw him, was that before or after Ables and the others went down to New Zealand?

A. Oh it was some time afterwards.

139 Q. When he came up to Honolulu from the Colonies?

A. Yes, sir.

Q. Did you have any talk with him?

A. I don't think I personally had any talk with him, but I was in the office when he was talking.

Q. Mr. Magoon?

A. Mr. Magoon was there.

Q. About the affiars of the Hagey Company?

A. Yes.

Q. What affiars of the Hagey Company did he refer to?

A. He gave us to understand that Mr. Cowert and Kirkpatrick were not straight, that they were dishonest and they were taking in money from patients and were not paying us our full share.

Q. And in the course of the conversation did he make any reference to this Tasmanian agreement or these sheep?

A. I have not any recollection that he mentioned those arrangements at all.

Q. Did you refer—did either you or Mr. Magoon refer to the Tasmanian contract or the sheep?

A. I don't think we knew anything about them.

Q. Well you remember that was subsequent to the receipt of this last letter that I read, don't you?

A. No, I don't think it was.

Q. Do you know when it was that Col. Moore came here?

A. No, I don't recollect when it was.

Q. Don't you recollect that it was after the beginning of 1898, or early part of 1898?

A. Oh, no, you are quite mistaken, I think, for I was not in the office then Mr. Robertson.

Q. Do you remember that it was in December, 1897?

A. It seems to me that it was before we had received the dividend the end of October.

140 Q. Well, don't you know, Mrs. Emerson, that at the time the agreement was made with Mr. Harrison and Mr. Gilmore in regard to Tasmania, Mr. Moore was at Auckland?

A. How could I know that?

Q. Why don't you know that Mr. Cowert says in his letter——

A. Yes——

Q. Here that Mr. Moore——

A. That he did not sign it, that is so.

Q. Refused to sign?

A. That is so, he did say so.

Q. You remember now that it was subsequent to the agreement with Mr. Harrison that he came up here, don't you?

A. Well, it looks as if it was.

Q. And subsequent to the receipt of this letter which refers to the Tasmanian agreement and the sheep?

A. Yes, I suppose so.

Q. Well, now, do these matters recall to your mind any conversation that you had with Col. Moore or that Mr. Magoon had with him in regard to the Tasmanian agreement or the sheep?

A. No, I don't recollect that that was mentioned.

Q. When did you first see a copy of that agreement between the Hagey Company and Harrison and Gilmore?

A. The first I saw was attached to the summons that was given me.
Q. The summons from the New Zealand Court?
A. Yes.
Q. I will ask you whether this is the summons you received?
A. Yes, that is the one I received, I put the date on it.
Q. Do you remember who delivered it to you?
A. I think young Mott-Smith did, I am not quite sure though.
141 Q. E. A. Mott-Smith?
A. Yes.

Mr. ROBERTSON: I offer this in evidence if the Court please.
The COURT: Any objection Mr. McClanahan?
Mr. MCCLANAHAN: No objection.
The COURT: It may be received in evidence and marked Plaintiff's Exhibit "M."
(Plaintiff's Exhibit "M" read in evidence.)

(Here the Court after the usual admonition to the Jury took a recess until 1:30 P. M.

Afternoon Session.

Direct examination of Mrs. DOROTHEA EMERSON resumed.

Mr. ROBERTSON:

Q. After receiving this New Zealand summons from Mr. Mott-Smith did you have any conversation with Ables in regard to it?
A. No, I did not.
Q. After receiving the New Zealand summons did you communicate with Mr. Harrison at all?
A. I never——

Objected to as immaterial.
Objection overruled. Exception.

(Last question read.)
A. I have had no opportunity of communicating with Mr. Harrison at all, I didn't know him, I didn't know where he was to be found.
Q. What do you mean when you say you had no opportunity of communicating with Mr. Harrison?
A. Why, I mean I could not write him a letter and tell him that I was not responsible or anything of that kind.
142 Q. Why, you were able to address a letter to him, were you not?
A. Why should I have addressed it? New Zealand would be an insufficient address to find him.
Q. Don't you know that he is described in this summons, in several different parts of it as a resident of Auckland? As a matter of fact you did not communicate with him?
A. I did not communicate with him at all.

Cross-examination of Mrs. DOROTHEA LAMB.

Mr. McCLANAHAN:

Q. I call your attention to a sentence in the letter marked Plaintiff's Exhibit "K" reading: "The letters written to Dexter were calculated to do us great harm." I will ask you if these are carbon copies of those letters?

Objected to as irrelevant and immaterial.

Mr. McCLANAHAN:

Q. Not carbon copies; I meant Letter press copies?
Objected to as irrelevant and immaterial.
Objection overruled. Exception.

Mr. McCLANAHAN:

Q. Here is another one?
A. These two are certainly letters to Dexter that I remember. I am just looking through this one.

Mr. McCLANAHAN: We offer in evidence letter identified by the witness as a typewritten copy of a letter sent to the Dexter referred to in the letter Plaintiff's Exhibit "K" dated September 23rd 1897, addressed to Ruby A. Dexter, Auckland New Zealand and
143 signed J. Alfred Magoon and I think it is Dorothea Lamb, yes, Dorothea Lamb.

Mr. ROBERTSON: We object to the letter on the ground that it is irrelevant and improper, it having no relation to any controversy involved in this case, but belonging to matters that are disconnected wholly from this case, on the ground that it is hearsay, being a communication between certain defendants in this case and one by the name of Ruby Dexter entirely hearsay as to this Plaintiff, he not being a party to it in any way, and it not being brought to his attention in any way. And third, that it is not proper cross examination.

Objection overruled. Exception.

(Letter of September 23, 1897 read in evidence.)

The COURT: Letter just offered and read in evidence may be received and marked Defendants' Exhibit "5.")

Mr. McCLANAHAN: We offer in evidence letter dated September 23rd, 1897, addressed to Ruby Dexter, care Dexter & Crozier, Auckland New Zealand, signed J. Alfred Magoon, and identified by the witness as being one of the letters referred to in Plaintiff's Exhibit "K."

Mr. ROBERTSON: We object to the letter being received in evidence on the ground that it is irrelevant and immaterial, in as much as that bears in no way upon any issue involved in this case. Secondly, that it is hearsay as to this plaintiff inasmuch as it is correspondence between one of the defendants and a third party wholly disconnected from any partnership or other transaction in this case; also that it is not proper cross examination.

Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Defendants' Exhibit "6."

144 (Defendants' Exhibit "6" read in evidence.)

Mr. McCLANAHAN: Can you identify this paper which I hand you as a letter press copy of the enclosure in the letter just read, copy of letter to Messrs. Cowert and Kirkpatrick?

A. Yes, I can.

Mr. McCLANAHAN: We offer in evidence letters dated September 27th, 1897, addressed to Cowert & Kirkpatrick, signed J. Alfred Magoon and identified by the witness as being an enclosure of the letter just read and offered in evidence and received in evidence.

The COURT: This letter last read being Defendants' Exhibit "6."

Mr. ROBERTSON: I object to the admission of this in evidence on the ground that it is irrelevant and immaterial and inasmuch as it has no bearing upon any issue involved in this case, is hearsay as to this plaintiff, being a communication between two persons, of which he had no knowledge and can be in nowise binding upon him; and further that it is not proper cross examination.

Objection overruled. Exception.

The COURT: The instrument offered and now read in evidence may be received in evidence and marked Defendants' Exhibit 7.

Mr. ROBERTSON: Exception.

Mr. McCLANAHAN: We offer in evidence letter dated December 16th, 1897, addressed to Dear Ruby, signed J. Alfred Magoon

145 and Dorothea Lamb and identified by the witness as being one of the letters referred to in Plaintiff's Exhibit "K."

Mr. ROBERTSON: I object to the letter being received in evidence on the ground that it is irrelevant and immaterial and having no bearing whatever upon any issue in this case, hearsay inasmuch as the Plaintiff here is no party to it. It is not a letter to him or by him. And thirdly on the ground it is not proper cross examination.

Objection overruled.

The COURT: Letter referred to may be received in evidence and marked Defendants' Exhibit "8."

(Defendants' Exhibit "8" read in evidence.)

Mr. McCLANAHAN: Can you identify this as copies of letters stated to have been inclosed in that letter to Ruby Dexter?

A. Did you ask me if this was enclosed too?

Q. If you can identify that as the copy of the letter to Cowert and Kirkpatrick which is stated to have been enclosed in a letter which I have just read, to Mr. Dexter?

A. What was the date of that letter?

Q. December 16th.

A. Yes, sir, I can.

Mr. McCLANAHAN: We offer in evidence letter dated December 16th, addressed to—both of them addressed to Messrs.—one addressed to Messrs. Cowert & Kirkpatrick, Hagey Institute, Auckland, New Zealand, and the other to T. I. Cowert and J. H. Kirkpatrick, Hagey Institute, Auckland, New Zealand, signed by J. Alfred Magoon and

Dorothea Lamb; the former one and the latter one by J. Alfred Magoon—no, I guess I am mistaken,—one is signed by him.

Mr. ROBERTSON: I object to the admission of these letters offered in evidence on the ground that they are irrelevant and im-
146 material and having no bearing upon any issue in this case, and hearsay so far as this plaintiff is concerned and not proper cross examination.

The COURT: These are the enclosures alluded to in the letter last read.

Mr. MCCLANAHAN: They are.

Objection overruled. Exception.

The COURT: The letters identified may be received together and read in evidence and marked Defendants' Exhibit "9."

(Defendants' Exhibit 9 read in evidence.)

Mr. MCCLANAHAN: I offer in evidence copy of letter dated October 21st—I will ask the witness is that one of the letters referred to in Plaintiff's Exhibit "K" as a letter sent—written to Dexter?

The COURT: By Mr. Magoon?

Mr. MCCLANAHAN: It does not say that. "The letters written to Dexter were calculated to do us great harm." Is that a copy of one of those letters?

The COURT: What is the date of that Exhibit "K" Mr. McClanahan?

Mr. MCCLANAHAN: October 30th.

A. Yes, sir.

Mr. MCCLANAHAN: It is. I offer in evidence copy of letter dated October 21st, 1897, addressed to Ruby Dexter signed J. Alfred Magoon and identified by witness as being one of the letters referred to in Plaintiff's Exhibit "K."

Mr. ROBERTSON: We object to the letter being received in evidence as being irrelevant and immaterial and having no bearing upon any issue in this case, hearsay as far as this plaintiff is concerned
147 and not proper cross examination.

Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Defendants' Exhibit "10."

(Defendants' Exhibit "10" read in evidence.)

Mr. MCCLANAHAN:

Q. Is this one of the letters referred to in Plaintiff's Exhibit "K" as having been sent to Dexter?

A. Yes, that is one.

Mr. MCCLANAHAN: I offer in evidence copy of letter dated October 21, 1897, addressed to Mr. Ruby A. Dexter and signed J. Alfred Magoon and Dorothea Lamb and identified by the witness as being a letter referred to written to Dexter in Plaintiff's Exhibit "K."

The COURT: It may be received and read in evidence and marked Defendants' Exhibit "11."

Mr. ROBERTSON: I object to this being received in evidence.

The COURT: The order is set aside until the objection is heard.

Mr. ROBERTSON: It is irrelevant and immaterial and it doesn't relate to any issue in this case. It is hearsay as far as this Plaintiff is concerned and not proper cross examination.

Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Defendants' Exhibit "11."

(Defendants' Exhibit "11" read in evidence.)

Mr. MCCLANAHAN:

Q. Referring to Plaintiff's Exhibit "L" being the letter addressed to Judge Magoon, signed T. E. Cowert, I read as follows:
148 "We sold one half interest in Tasmania—this letter is dated October 1st. "We sold one half interest in Tasmania last week for 8000 sheep and 5000 Pounds. The parties could not—500 Pounds. The parties could not raise 500 Pounds after agreeing to and paid 250, I took half, less 250 Pounds. The sheep and lease of land, 24,000 acres, was valued at 2000 Pounds. We hope to sell the sheep in a short time." I will ask you if that is the only notice you ever had of this and all the notice you ever had of this sheep transaction with Mr. Harrison prior to the service on you of the New Zealand suit.

A. That was the only notice, Mr. McClanahan, and I have not any connection in my mind between those sheep and Mr. Harrison. I didn't know that referred to Mr. Harrison. When I got the summons I didn't understand that that referred to those sheep.

Q. You had no notice that that transaction was the transaction with Mr. Harrison?

A. No, I had not any idea it was at all.

Q. Did you have any knowledge or notice that Mr. Harrison was your partner?

A. No, I had not any at all.

Q. Did you have any notice or knowledge that you were obligated as a copartner to a guarantee amounting to 10,000 dollars in case of a dissatisfaction with Mr. Harrison with the Hagey Gold Cure business in Tasmania?

A. I know nothing whatever about it.

Redirect examination of Mrs. DOROTHEA EMERSON.

149 Mr. ROBERTSON:

Q. Who did you think this sheep transaction was entered into with?

Mr. MCCLANAHAN: I object to what she thought. Objection sustained. Exception.

Mr. MCCLANAHAN:

Q. Did you take any steps to ascertain who the sheep transaction was with?

Objected to as immaterial. Objection overruled. Exception.

(Last question read.)

A. The only steps we took was what you heard in Mr. Magoon's letter to Mr. Kirkpatrick and he tried to repudiate everything that he had done as soon as we had any suspicions aroused.

Q. Which letter is that, one of these letters that has been read?

A. Why yes, letters that we wrote to Ruby Dexter and letters that we wrote to Kirkpatrick and Cowert as soon as we had those suspicions that all was not right, we immediately did everything we could to repudiate their actions.

Q. None of those letters referred to the Tasmanian agreement or the sheep transaction did they?

A. They may not say exactly the sheep transaction, but anything that was questioned we wished to have repudiated.

Q. Well at no time did you or Mr. Magoon ever raise any question as to the sheep transaction did you?

Mr. McClanahan: I object to that as improper redirect examination.

(Last question read.)

Objection overruled. Exception.

150 A. It seems to me that certainly in one of those letters that something was said about their not having any right to sell the sheep.

Mr. Robertson:

Q. Not that I know of.

A. In Mr. Magoon's letter, I think Exhibit 7.

Q. I will ask you if this is the letter that you refer to, dated December 16th, addressed Dear Ruby, where it says: "They have sold territory as I understand and taken in payment sheep and lambs which they had no right to do"?

A. Yes, that is what I refer to.

Q. That is in defendants' Exhibit 8. And any other time prior to the beginning of this suit did you or Mr. Magoon raise any question as to that sheep transaction?

Objected to as improper direct examination. Objection overruled. Exception.

A. Why I know in a general way that as soon as our suspicions were aroused, as soon as we thought that Mr. Kirkpatrick and Cowert weren't honest men we immediately tried to get ourselves free from them. We did everything in our power to stop our power of attorney and put ourselves right, we did not want to be bound by anything wrong they had done.

Q. By taking all the steps in your power you refer to this correspondence which has been put in evidence here, do——

A. To that and to the instructions to Ruby Dexter to have our power of attorney cancelled.

Q. As contained in these letters that have been read?

A. Yes.

Q. Did you, or Mr. Magoon in your presence, speak to Col. Moore

when he arrived here in regard to this correspondence that
151 you had been having with Dexter and Cowert and Kirkpatrick?

Objected to as improper re-direct examination. Objection overruled. Exception.

A. I don't remember Col. Moore was there in the office for sometime and there were several of us present. I don't remember just what was said. We didn't altogether believe what Col. Moore stated there. It was subsequent facts that made us think that he and Mr. Ables were in the right and Cowert and Kirkpatrick were in the wrong. We were unwilling to believe this against Cowert and Kirkpatrick, we still thought they were honest men as long as we could.

Recross-examination of Mrs. DOROTHEA EMERSON.

Mr. MCCLANAHAN:

Q. Mrs. Emerson you say that these letters were the steps taken by you in the sheep matter; don't you take another step in connection with Mr. Magoon to send some one down there?

Objected to as irrelevant and immaterial and not proper re-cross examination. Objection overruled. Exception.

Q. A man named Good?
A. What do you say?
Q. Did you not send some one down there or make arrangements to send some one down there to represent you, to cancel and straighten out matters, a man named Good?

152 Objected to as irrelevant and immaterial and hearsay. Objection overruled. Exception.

Mr. MCCLANAHAN:

Q. Do you know anything about that matter?
A. I don't remember it.

Direct examination of L. C. ABLES, Recalled for Plaintiff.

Mr. ROBERTSON:

Q. Mr. Ables, state whether or not you have made up the statement in regard to the item of territory referred to in the trial balance of October 31st?
A. I have.
Q. Have you it there?
A. I have.
Q. Just state what represents the item that make up the total item found in the trial balance?
A. It does.

Mr. MCCLANAHAN: I object to it as incompetent, irrelevant and immaterial unless it can be shown that the notice of it was brought home to the defendants, Magoon, McStocker and Emerson.

Mr. ROBERTSON: The trial balances were sent to Mr. McStocker. Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Plaintiff's Exhibit "N."

(Plaintiff's Exhibit "N" read in evidence.)

Q. Smith, Garlick & Pollock, 4500 Pounds. Was that also on account of the New South Wales, that last item?

153 A. Yes it says so there.

Q. You didn't put it down——

Mr. ROBERTSON: I ask leave of the Court to question this witness further as to the date of Col. Moore's departure from Auckland, for Honolulu. I understood him yesterday to say that it was in October. I find in looking over Mr. Ables' testimony on the last trial that he testified different and I would like to have an opportunity of his correcting his testimony on that point.

The COURT: I think that permission should be accorded.

Mr. ROBERTSON:

Q. Mr. Ables, I will call your attention to this question and answer in the transcript of testimony at the last trial relating to Col. Moore: "Q. Have you refreshed your memory by referring to the book as to the date of Moore's departure for Honolulu? A. As near as I can arrive at it it was the 6th of December. There is money charged to him on that date and he left about that time. The ticket was not paid for until after."

A. I can show why there might be a little difference in that time by that book.

Q. Which book?

A. By the book there. It was impossible for me to tell by memory and I referred to the book when Mr. Moore got the money. He got some money at one time and I find another time there on this trial I find the money was actually charged to Mr. Cowert and Kirkpatrick on the 1st of October, paid to him, and I can show it to you Mr. Robertson, and I might have thought that he travelled on that money that was charged to him at the time instead of this money. I knew that he could not go without money. That is the way I got it. I did not pretend to remember those things. I

154 find upon looking over this that the money was charged.

Q. To Cowert and Kirkpatrick?

A. To Cowert and Kirkpatrick but paid to Col. Moore.

Q. What date?

A. That would be October 2nd.

Q. Well, in your judgment, the best of your recollection, now upon what date or about what date would Col. Moore leave Auckland for Honolulu, about the 2nd of October or 6th of December?

A. About the 2nd. About the 2nd, that is the time he got the money from Mr.——

Q. What I want to arrive at is which date is correct, the 2nd of October or 6th of December, the date of his leaving Auckland. That is the same book that you referred to at the time of your testimony at the last trial Mr. Ables, was it not?

A. Yes, sir, it is the only book that I have had Mr. Robertson. Col. Moore got some money on the 6th and I accounted for that date probably that way. He got this month on October 2nd, it was not charged to him, Cowert and Kirkpatrick had money due them and they owed Col. Moore, and they instructed me to give Col. Moore the money and charge it to their account, which I did.

Q. Didn't you pay Col. Moore money in December?

A. Yes, sir I paid him some money in December, but I see it was a small quantity.

Q. Well, then he must have been there must he not in December?

A. I paid him, yes, he must have been there. That was only 6 Pounds I find on that date.

Q. I will read this evidence of yours on the trial again: "Q. Have you refreshed your memory by referring to the book as to the date of Moore's departure for Honolulu? A. As near as I can arrive
155 at it, it was the 6th of December. There is money charged to him on that date and he left about that time."

A. Well there is money charged on that date but there was not so much charged as there was at this other time, 500.

Q. Does the fact that there is an entry there, money paid to him, refresh your memory now, to the effect that he didn't leave until the 6th of December?

A. He must have returned by that time, have got back by December. It is October, I am quite confident that he came away after he was paid that 100 Pounds, 50 charged to Mr. Cowert and 50 to Mr. Kirkpatrick.

Q. And you think that he returned in December?

A. I can't account for that 6 Pounds in any other way, it was paid to him and charged to this account.

Q. Did you account for it in your evidence on the last trial?

Mr. McCLANAHAN: I object to that as an effort to impeach the witness.

Objection sustained. Exception.

Mr. ROBERTSON: With consent of counsel for defendants I would like to read in evidence the testimony of E. I. Spalding as given on the previous trial of this case.

Mr. McCLANAHAN: We will admit the value of 2000 Pounds Sterling to be what Mr. Spalding testified it to be.

Mr. ROBERTSON: I propose to read to the Jury if the Court please the deposition of Alfred Adward Gilmore and will read Mr. Spalding's testimony first.

(Evidence of E. I. Spalding commencing on page 37 of the testimony of the second trial of the case of Harrison *vs.* Magoon and others, September 1901 read in evidence)

156 Mr. McCLANAHAN: We object to the reading of this deposition of Mr. Gilmore's on ground it is not a deposition taken in the case at bar. It is being read here against defendants who were not in the suit at the time the deposition was taken. We made the objection because we were sued jointly as partners.

The COURT: Objection overruled.

The deposition may be read.

Mr. McCLANAHAN: Exception.

(Deposition of Alfred Edward Gilmore read in evidence)

In answer to question 32 being read Mr. McClanahan made the following motion:

Mr. McCLANAHAN: I ask that his suspicions be stricken out, the whole answer.

The COURT: That portion of the answer may be stricken out, his suspicions. "I do not know" may remain in.

On the answer to question 34 being read Mr. McClanahan made the following motion:

Mr. McCLANAHAN: I ask that that be stricken out, because it is based on the answer which has been stricken out.

The COURT: It may be stricken out.

Mr. ROBERTSON: Exception.

"Q. 35. Did you mention the matter to Harrison?

A. Yes, sir."

Mr. McCLANAHAN: I object to that and ask that it be stricken out.

The COURT: It is so ordered.

Mr. ROBERTSON: Exception.

Mr. ROBERTSON: "Q. 36. If so whom?

A. On several occasions."

157 Mr. McCLANAHAN: Object to that and ask that it be stricken out.

The COURT: Motion granted.

Mr. ROBERTSON: Exception.

Mr. McCLANAHAN: I object to question No. 44 as immaterial and ask that the answer be stricken out.

Objection overruled. Exception.

Mr. McClanahan objects to question No. 49 as calling for hearsay evidence.

Objection overruled. Exception.

Mr. McClanahan objects to question 52 as being immaterial.

Objection sustained. Exception.

Mr. McClanahan objects to question 53 as immaterial.

Objection sustained. Exception.

Mr. McClanahan objects to question 54 as being immaterial and being based on the last question disallowed.

Objection sustained. Exception.

Mr. McClanahan objects to question 56 calling for the conclusion of the witness.

Objection sustained. Exception.

Mr. McClanahan objects to question 57 as immaterial and calling for the conclusion of the witness.

Objection sustained. Exception.

Mr. McClanahan objects to question 58 being based on the question which has ruled out.

Objection sustained. Exception.

Mr. McClanahan objects to question 59 as immaterial.

158 Objection sustained. Exception.

(Here the Court after the usual admonition to the Jury adjourned until tomorrow morning at 9 o'clock.)

159 In the Circuit Court of the First Circuit, Territory if Hawaii.

T. M. HARRISON
vs.
J. A. MAGOON ET AL.

NOVEMBER 2, 1903.

Direct examination of T. M. HARRISON, sworn.

Mr. ROBERTSON:

Q. What is your name?
A. Thomas Milner Harrison.
Q. You are plaintiff in this case?
A. I am.
Q. State whether or not you are acquainted with T. E. Cowert and J. K. Kirkpatrick and L. C. Ables?
A. Yes, sir, I know them.
Q. Where did you become acquainted with them?
A. In Auckland, New Zealand.
Q. When?
A. About in July or August, 1897, I think about that time.
Q. Did you enter into any transaction with them?
A. Yes, I entered into the contract under which I am suing.
Q. I show you Exhibit "C" and ask you if that is the contract you refer to?
A. Yes that is it.
Q. Is this your signature T. M. Harrison?
A. Yes.
Q. Whereabouts was this contract prepared?
A. In Auckland.
Q. Whereabouts in Auckland?
A. Well it was prepared at the Hagey Institute chiefly and
160 it was signed there and drafted there. It was typewritten at my office.
Q. You have heard Mr. Ables' Testimony that when this contract was signed the words in paragraph 4, which are underlined here, the words "if at or before" were not in the agreement. What have you to say to that?
A. They were in it. We discussed the matter over and they were put in.
Q. Has any change whatever been made in this agreement since it was signed?
A. None whatever.
Q. With reference to this transcation, had any other drafts of agreements been prepared prior to the one we have just referred to?
A. Yes, sir, there were two others.
Q. Do you remember the date that the first draft bore?
A. I think it is the 16th September.
Q. I will ask you—I show you this document and ask you if this is it?

A. Yes, that is it.

Q. I notice interlined between the typewritten lines of this contract certain words in lead pencil. I will ask you whether those words in lead pencil were there at the time the agreement was signed?

A. They were put in since.

Q. What was the occasion of putting them in.

A. Well when we were preparing the new draft, making the draft for the later agreement they were put in as the change desired.

Q. In other words, a guide to the typewriter?

A. Yes, sir.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: No objection.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "O."

(Plaintiff's Exhibit "O" read in evidence.)

161 Mr. ROBERTSON:

Q. How did it come about Mr. Harrison that changes were agreed upon to be made in this first draft of the agreement?

A. Well some things were unsatisfactory and we thought we could put in more satisactory shape and they were simply changes agreed upon to be made, and besides that I had not seen the documents by which the Hagey Company—under which I was contracting, had been formed, either the powers of attorney and their partnership articles at the time that that first draft was made, and when I afterwards saw them I wanted some changes made.

Q. Do you remember the date of the second draft of the agreement?

A. I think September 20th or 21st.

Q. I show you this document and ask you if this is that second draft?

A. Yes, sir, that is it.

Mr. ROBERTSON: I offer it in evidence if the Court please.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "P."

(Plaintiff's Exhibit "P" read in evidence.)

Q. There are certain words written in here in lead pencil, state whether or not they were in at the time the agreement was signed?

A. No, they were not in at the time the agreement was signed. They were made at the time we were considering the new draft or either of them, I forget which.

Q. What was the consideration for this transaction that you and Gilmore had with the Hagey Company?

A. I had an interest in the lease of a sheep run with six thousand old sheep—six or seven odd, sheep and it was agreed that Mr. Ables would take them in lieu of 2,000 Pounds and that I should
162 be given a 2000 Pounds interest in Tasmania.

Mr. MCCLANAHAN: If the Court please I ask that what Mr. Ables agreed, be stricken out.

A. I said it was agreed between me and the Hagey Company.

Mr. ROBERTSON:

Q. Do you know why the transfer of the sheep was made to Ables personally?

A. The explanation that Cowert and Kirkpatrick gave we was that Ables wanted to get out of the Company and that he was willing to take this in part payment of his interest in the Company that is, for the purpose of buying him out, and that consequently it was to be transferred to him and I was to get an interest in Tasmania in lieu of the proportion of Mr. Ables' interest that I bought out.

Mr. MCCLANAHAN: I ask that the answer of the witness be strickenout as hearsay so far as the Company was concerned, what Cowert and Kirkpatrick told him that Ables——

A. I afterwards asked Mr. Ables if it were true and he said he would rather ranch than stay with the Hagey business.

Mr. MCCLANAHAN: I object to the witness breaking in in that way while there is a motion before the Court.

The COURT: The motion is granted as to what communications were had as to the effect of this transfer, to this witness by Cowert and Kirkpatrick, the reason for it as stated to the witness.

Mr. ROBERTSON:

Q. State whether or not the transfer of your sheep and sheep run to Ables was in writing?

A. Yes.

Q. I will ask you if this is the instrument of transfer?

A. Yes, sir, that is it.

Mr. ROBERTSON: I offer this in evidence if the Court please.

163 The COURT: It may be received in evidence and marked Plaintiff's Exhibit "Q."

(Plaintiff's Exhibit "Q" read in evidence.

Mr. ROBERTSON:

Q. State whether or not when the third draft of the agreement with the Hagey Company was made, that is, the contract upon which this suit was brought, any further consideration was added as a consideration for your interest in the Tasmania partnership?

A. Yes, it was arranged that Robaison would release all claim he had against the 500 odd sheep that I had assigned to Ables and I held in possession.

Q. Was that put in writing?

A. Yes.

Q. I will ask you if this is the writing?

A. Yes, that is it.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: Of course I suppose counsel is going to show ratification on the part of defendants in regard to these matters. I object to it unless there is a ratification shown.

Mr. ROBERTSON: We all know that is a part of our case; if we do not do it the defendants get the benefit of it.

The COURT: Upon the offer of counsel the objection is overruled. It may be received and read in evidence and marked Plaintiff's Exhibit "R."

Plaintiff's Exhibit "R" read in evidence.

Mr. ROBERTSON:

Q. After signing this agreement with the Hagey Company,
164 what did you do pursuant to it?

A. I made arrangements to go and start the business in Tasmania. They said the medicines were not quite ready when the boat was to sail for Sidney on the 4th of October, there was another steamer sailing in four or five days, and they told me if I would go over to Sidney by the first boat, the one on the 4th of October they would send me the medicines and also the instructions for carrying on the business, on the boat coming four or five days afterwards, and that would be the 8th or 9th of October, or sometime, then, I forget the exact date, and I accordingly went on the boat on the 4th of October, or I sailed about two o'clock in the morning of the 5th and waited in Sidney until I received a letter from Mr. Ables dated, I think it is the 12th October, and also the medicines and instructions for carrying on the business in Tasmania.

Q. When you refer to that letter of Mr. Ables you mean the one that was filed in evidence?

A. Yes, sir.

Q. Addresed to you at Sidney?

A. Yes, sir I did not receive the instructions for a day or two after I had received the letter, they were delayed in the post office some way but I got them ultimately; then I was very much dissatisfied with the instructions, they were different from what they had represented to me and I desired to go back and try to get out of the contract on account of the business being of a different nature from what the Hagey people represented it.

Q. I will ask you whether or not those instructions were in writing?

A. They were in typewriting as I remember it corrected in Mr. Cowert's handwriting.

Q. I will ask you whether these are the instructions that accompanied the medecine sent to you at Sidney by the Hagey Company?

165 A. Yes, sir.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: No objection.

The COURT: They may be received in evidence and marked Plaintiff's Exhibit "S."

(Plaintiff's Exhibit "S" read in evidence.

Mr. ROBERTSON:

Q. I understood you to say that these written instructions didn't coincide with representations that had been made to you with refer-

ence to what the treatment consisted of; in what respect do they differ?

Q. It has been represented to me that the drugs they used would not make a man sick unless he took narcotics for which he was being cured, that they didn't give drugs that would make anybody sick, just because a man used whiskey or opium, or whatever it was they were using why they represented that they didn't use narcotics, and represented people who didn't use narcotics for which patients were being cured caused the narcotics to be distasteful, which a person had been in the habit of using, distasteful to him, so that it would make him sick, and that the preparation used was a secret only known to the medical profession. And they denied the fact that they used aqua morphia or any drug that would make a man sick when any of their patients disobeyed them or used a narcotic for which he was being cured, and said that any person that said that, slandered them or didn't know what he was talking about, that they were in the habit of using such a thing, that it was not so, and

166 they referred to their position in the church, and Dr. Wolvington's position as a preacher and stated that as Christians and gentlemen it was not so,—that was part of the representation getting me to put money into the thing. When I found out that what they had affirmed and denied—what they had affirmed was exactly the reverse of the nature of the business I came to the conclusion that the preparation was not a secret from the medical profession, from things I had been told by doctors it could not be made a permanent success, that it was merely tricking a man into believing that whiskey or whatever he was being cured of made him sick when nothing of the kind occurred, and that he would soon discover the trick played on him and be in a worse position after it than he had been before in many cases, and as a result it was a humbug business and could not be made a permanent success of and I wished to be let out of my bargain.

Q. Well before leaving, starting for Tasmania, were any representations made to you by the Company with reference to the treatment deceiving the patient?

A. They said they didn't deceive the patients at all, that they never gave him anything that would make a sound man—that they could give the same thing that made him sick to any other person that was not taking a narcotic and it would not make that person sick, and they said they had to be constantly doing that for patients to take the same thing or formula, the same thing that they were giving the patient would get sick and they themselves would not.

Q. State whether or not you became dissatisfied with the business by reason of these written instructions?

A. I never thought I could make the business satisfactory after I read those instructions.

Mr. McClanahan: I ask that the answer be stricken out

167 as irresponsive to the question.

(Last question read.)

The Court: The question is susceptible of chronological answer it seems to me.

The motion is granted. Let the answer be stricken out.

(Last question read.)

A. Well I can only say that I thought I could not make the business satisfactory when I read the instructions.

Mr. McClanahan: I make the same motion.

A. Whether that amounts to dissatisfaction.

The Court: Let the motion be granted.
The answer may be stricken out.

Mr. Robertson:

Q. I will ask you if you can make any more definite answer to that question Mr. Harrison?

A. I was dissatisfied.

Mr. McClanahan: I object. An answer has not been made to the question.

The Court: The motion has been granted to strike it out.
Objection sustained. Exception.

A. As far as the business had gone I was dissatisfied with it.

Mr. Robertson:

Q. When?

A. When I received the instructions as far as the business had gone and as far as the instructions were considered they were insatisfactory.

Q. Then what did you do?

A. I wanted to see some people in Melbourne, and also thought I could get a steamer from Melbourne at an earlier date,
168 steamer for New Zealand from Melbourne at an earlier date than I could from Sidney, so I went down to Melbourne, and found I could not get a steamer as I had expected, I remained a day or two in Melbourne, came back and got a steamer from Sidney to Wellington, one not sailing for Auckland for sometime, and proceeded to Wellington, and that from Melbourne I telegraphed to all the people I knew of that ever seen those sheep, except Robaison, that I claimed the sheep, not to buy them, something to that effect, I think it was "Don't buy sheep, returning." So I expected that these people would sell the sheep as soon as possible and try and hinder me and I could not get out of the contract and they would try to realize anything they could out of them, no matter what it was, consequently I cabled to four or five people that I thought knew most about the sheep not to buy, I think it was, not to buy sheep, returning. I did not cable to Robaison because I knew he would get the sheep if he could and cabling him would only put him on his guard. I took the steamer from Sidney as soon as I could for Wellington, and met Robaison who told me that he had the only thing that was worth anything, and that was the sheep, and advised me that I had been taken in, I think he invited me to take a journey, which I did not accept, and then I went straight north to Auckland and as soon as I could I tried to get out of the bargain. Messrs. Cowert

and Kirkpatrick and the Hagey people said they had not got the stock of the market value of 2000 Pounds but that would get me the sheep back, although they had sold them, that they thought they could cancel their contract for the sale of the sheep and get the sheep back. I said that would be satisfactory. I waited at Auckland for a time to get the sheep back and I even went out to the run
169 to look at the sheep in the meantime, and they utterly failed to get the sheep back and said Robaison would not sell them the sheep for anything less than it cost them to buy me out, 2,000 Pounds.

Mr. McCLANAHAN: I object to anything that Robaison said.

A. That is the reason that they gave me for not being able to get the sheep back.

Q. Are they statements of Robaison?

A. No, they are statements of Cowert and Kirkpatrick, the reason why they didn't get the sheep back.

Q. That they gave you?

A. Yes, sir, that they gave to me, that they could not get them back from Robaison, any cheaper than it would cost to give me 2000 dollars back.

Q. That was the response to you?

A. That was the ultimate response, and I waited for several weeks, in the course of 8 or 10 weeks they kept me waiting to get the sheep back and ultimately that is what they told me, that they could not get the sheep back any cheaper than it would take to buy me out for 2000 Pounds and said that I had better go on with the contract.

Mr. ROBERTSON:

Q. Then what did you do?

A. So I concluded that I would go to Tasmania and give the thing a trial and see if I could make it worth the money I paid for it. I didn't think I could but I would rather have done that than have been obliged to try and collect and go for these people as I have been obliged to do. And I went there for a month and became quite convinced that my only recourse for my getting the money back that I put into the thing was to acquaint them with my dissatis-
170 faction and secure stock of the market value of 2000 Pounds

Q. Had any one preceeded you to Tasmania under the terms of this contract with the Hagey Company?

A. Yes, sir, Gilmore went some time in November. I urged him to go and promised him a month's salary, promised him the payment of his salary if he would go and work up the business so that when I or anybody else followed he would have made some preparation for starting an institute.

Q. Did anybody else go there besides Mr. Gilmore?

A. O'Brien went with me on the 17th of January.

Q. Who was O'Brien?

A. He was a man sent by the Hagey people under the clause in the agreement under which they had a right to send one of themselves or some competent person to assist us.

Q. Did you and O'Brien go together?

A. We started together, he arrived about three days before I did. I went overland from Sidney and he went direct by steamer. It took him only three days. I had some people to see in Melbourne, I was about three days later in arriving than he was.

Q. What part of Tasmania did you go to?

A. We went to Hobart the capital.

Q. The capital of the Colony?

A. Yes, sir.

Q. How large a city is that?

A. I think a city of about 30,000 people.

Q. In arriving at Hobart what did you do first to start the business?

A. We advertised it and distributed circulars and went around and interviewed the leading people in the town to get their assistance and announce the nature of our business, to get information as to prospective patients, all the information we could, rented premises
171 and prepared to do business.

Q. Well do you know whether or not that was the usual method?

A. That was the method.

Q. Of starting this or the business of the Hagey Institute?

A. That was the method, what we had been told, and that it was, that was the only method I had ever seen, the method told me by Cowert and Kirkpatrick and the other Hagey partners.

Q. Tell us in further detail if you can what you did with reference to the business in Hobart?

A. We didn't succeed in getting any patients and there was some trouble arouse between Gilmore and I and O'Brien, we believed that he was holding patients back from certain things he said.

Mr. McClanahan: I ask that that be stricken out, the conclusions and reasons.

The Court: The motion is granted. Let the words following "we believe-" be stricken out.

Mr. Robertson: Exception.

Q. I will ask you again what did O'Brien say to you in regard to the matter?

Objected to.

Objection overruled. Exception.

Mr. Robertson:

Q. What statements of O'Brien do you refer to?

A. Well, he said when Kirkpatrick arrived there, they would be better people to treat patients, that Gilmore and I had not enough experience he thought to treat patients and they would be better people to handle patients after Kirkpatrick arrived. The funds run out and on the morning of the 1st of March, I think it was, and it was raining, if I am——

172 Q. Wait a minute. What kind of premises did you secure for your institute?

A. We secured premises on one of the principal streets, I think it

was near the post office, a two story house, and as good as we could get for the money we had to spend.

Q. How many rooms to it?

A. There were three or four bedrooms upstairs and there was a room we intended to make into a billiard room and a sitting room and office, a sort of office, secretary's office, a sitting room down below, and then we had a place at the back where we kept liquors and medicines for treatment.

Q. Were the premises large enough for a Hagey Institute?

A. Yes, sir, as large as the money we had warranted and large enought to treat patients in.

Q. Can you give us any further details, any action as to matters connected with the business in Tasmania or your methods and advertisements to get patients?

A. Well I interviewed the relatives of some of the prospective patients and they seemed disposed to send patients, but they finally said O'Brien had told them——

Mr. McCLANAHAN: I object to what O'Brien said.

A. If I cannot testify to what they said then——

Mr. McCLANAHAN: You are a lawyer Mr. Harrison.

A. I think it is part of the *res gestæ* of the reason they gave for not sending the patients.

Mr. McCLANAHAN: I object to what the relations of prospective patients said.

Mr. ROBERTSON:

Q. Did you leave anything undone that you might have done to make the Institute a success?

A. No, I was very anxious——

173 Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception.

Mr. ROBERTSON:

Q. Did you fail to do anything that was usually done in connection with starting a Hagey Institute.

Mr. McCLANAHAN: Same objection. Calling for the opinion of the witness.

Objection sustained. Exception.

Mr. ROBERTSON:

Q. As a matter of fact did you succeed in getting any patients in your institute at Hobart?

A. No, we did everything we could think of to obtain them, Gilmore and I, myself particularly and Gilmore also and what I asked him to do in the matter and we could no- succeed in getting anything. We followed out all the instructions and advice as closely as we could that had been given to us and many other things *and many other things* we had gained, from the partnership and we followed out any advice of our own that we could think of.

Q. How long did you keep your institute open?

A. About a month.
Q. From when to when?
A. From the 1st of February to *to* 1st of March. I was very much afraid of being accused of bad faith and I did my utmost to get the institute started.

Mr. McCLANAHAN: We ask that it be stricken out as irresponsive.
The COURT: It may be stricken out from the words "I was very much afraid."
Mr. ROBERTSON: Exception.

174 Q. I will ask you whether or not a fund for the starting of the Tasmanian business was put up under the terms of your contract with the Hagey Company?
A. I put up my share and the rest of the Company put up their share, Gilmore, we deducted 10 Pence from one month of his salary as his share, he never put up any cash, it was deducted from his salary.
Q. Can you state how much was put up in cash?
A. I put up 80 Pounds and the people, the Auckland people whom I contracted with at Auckland, put up 110 Pounds.
Q. Pounds Sterling?
A. Sterling, yes.
Q. I will ask you whether the statements of your receipts and disbursements attached to Mr. Gilmore's disposition whether it is correct?
A. Yes, that is correct at the time I handed the balance over to Mr. Gilmore.
Q. And that balance was how much?
A. 34 Pounds 16 Shillings on the 11th February.
Q. Can you state whether or not there are any debts of obligations owing to the Institute at that time?
A. When we went away at the end of the month the balance that we left in the Bank was some 18 or 19 Pounds as I remember it, was barely sufficient to pay the outstanding obligations without paying a claim that Gilmore had of 30 Pounds salary which I said he was not entitled to.
Q. Was it possible to continue the Institute any longer?
A. Not without——

Mr. McCLANAHAN: I object to that as calling for the opinion of the witness.
Objection sustained. Exception.

175 Mr. ROBERTSON:

Q. Could you carry on the business any longer?

Objected to on the same ground.
Objection sustained. Exception.

Mr. ROBERTSON:

Q. Could the business have been maintained any longer?

Objected to on the same ground.
Objection sustained. Exception.

Mr. ROBERTSON:

Q. Were either you or Gilmore or the Hagey Company willing to put up any further funds for the continuance of the business?

Objected to as immaterial.
Objection overruled. Exception.

A. Mr. Cowert and Mr. Kirkpatrick and the other members of the Hagey Company, O'Brien he had a thought they would not put up any more money than the 200 Pounds, and Gilmore said they would not give the same, and when we consulted about the matter we decided it was hopeless to try and go on because they had shown us that that was all the money they were going to put up.

Q. State whether or not you became dissatisfied with the condition of the business in Tasmania?

A. Yes, I became very much dissatisfied with it.

Q. Why.

A. Because there was no prospect of making the value that I had put into it out of the business, I didn't see any possible chance of ever realizing anything out of it. We had failed to take in any money, there was no money in the treasury, and there was no immediate prospect of getting any money, and I had about 2000 Pounds, or sheep of the value of it and there was no prospect
176 of my getting it out of Tasmania that I could see, so I consequently was dissatisfied.

Q. Then what did you do?

A. I proceeded back, Gilmore left the day before I did and I handed the whole thing over to O'Brien who was the representative of the other parties to this other contract, and proceeded north to Sidney on my way to Auckland on the 9th of March, 9th or 10th of March. I was only—at the hotel where I was stopping at in the city was Wolvington and Kirkpatrick. They said they had heard I was dissatisfied with the agreement and wanted to know what was wrong and I told them my reason for dissatisfaction in much the same way as I have given evidence here, and said I demanded stock of the market value of 2000 Pounds. They said they didn't want me to—they wanted me to retain an interest in the Company as I knew too much about their method of treatment and if I got out of it altogether, to kindly send them a statement of the best terms of settlement I could make and write them a letter to that effect. So the following day I wrote them a letter, on the 11th of March.

Q. How did you make the demand for the 2000 Pounds worth of stock?

A. I demanded stock of the market value of 2000 Pounds and they asked me to put my demand in writing and also the best terms of settlement.

Q. You say you did put your demand in writing?

A. On the following day I wrote them what I would do in settlement.

Q. You say you did put your demand in writing?

A. Yes, sir. The copy of the letter was filed for the—writing to request their terms——

Objected to on the ground that the writing speaks for itself.

177 Mr. ROBERTSON:

Q. Under what provision in the contract, if any, did you make this demand on Cowert or Kirkpatrick?

A. Under clause 4.

Mr. MCCLANAHAN: I object. The contract speaks for itself.

Objection sustained. Exception.

Mr. ROBERTSON:

Q. State whether or not Kirkpatrick made any reply to your demand except a request for you to state the terms upon which you would settle?

A. That was about the only reply that I remember, to let him know the best terms on which we could settle, that he didn't want me to get out of the Hagey business altogether, on account of my knowing so much about it he wanted me to retain some interest, and let him have the best terms on which I could settle and kindly write them to him.

Q. Did you tell him on what terms you would settle?

A. I wrote to him the next day on the terms I would settle.

Q. Do you know where the letter is you wrote to him?

A. Well, I kept a copy of it, there was a copy in Court here at the last trial.

Q. Do you know where that letter is that you wrote to him?

A. I suppose he has it, I don't know.

Q. Have you got it?

A. I have not got it.

Q. Who was present when you made the demand on Kirkpatrick?

A. Wolvington and he and I.

Q. In what capacity did you make demand upon him?

Objected to as immaterial and calling for the conclusion of the witness.

178 Objection sustained. Exception.

Q. I will ask you whether or not this is a copy of the letter you wrote at that time?

A. Yes, sir.

Mr. ROBERTSON: I offer this in evidence and marked Plaintiff's Exhibit "T."

(Plaintiff's Exhibit "T" read in evidence.)

Q. Did you receive any reply to that letter?

A. None in writing.

Q. Did you receive any reply?

A. I think I saw Kirkpatrick and he acknowledged that he received the letter.

Q. Anything further?

A. No.

Q. Did the Hagey Company deliver you or any one on behalf of the Company deliver you 2000 Pounds worth of stock in any other field of the Company's operations?

A. No.

Q. Did any one of the parties of the first part, that is individually, that is the parties of the first part, under this contract upon which you are suing, deliver you any stock of the market value of 2000 Pounds in any other field of the Company's operations?

Objected to.

(Here the Court took a recess until this afternoon 1:30 P. M.)

179 Afternoon Session.

Direct examination of T. M. HARRISON, resumed.

(Last question read.)
Objection overruled.

A. No, nobody has ever offered me any stock of that market value.

Mr. ROBERTSON:

Q. Or the value of the stock?
A. No person has ever *ever* offered me stock of the market value or the value of the stock in settlement.
Q. On your return from Tasmania to Auckland did you see Mr. Ables?
A. I saw him after I arrived in Auckland.
Q. On your return from Tasmania?
A. Not from Tasmania, no, no, on my first return from Sidney I Did.
Q. Did you see Mr. Ables on -our return from Tasmania?
A. I did not.
Q. Did you know where he was?

Objected to as immaterial.
Objections sustained. Exception.

A. I had not been informed.

Mr. ROBERTSON:

Q. Was Mr. Ables in Auckland, on your return to Auckland from Tasmania?
A. I could not find him, I tried my best to find him and could not find him; I could not find any of the Hagey partners at all.
Q. And the two that you did find were where?
A. I saw Wolvington and Kirkpatrick at Sidney and I heard Cowert was in the Southern part of New Zealand. I never saw him after my return. The rest I could not locate.

180 Mr. MCCLANAHAN: I object to his statement of what he heard.
The COURT: That may be stricken out. "I Heard Cowert" etc.

Q. You didn't see Cowert as a matter of fact?
A. He was served with the writ under the New Zealand statute but I didn't see him at all.

Mr. ROBERTSON:

Q. On your return to Auckland from Tasmania did you endeavor to find other members of the Hagey Company than Wolvington and Kirkpatrick?

A. Yes, sir I endeavored to find——

Objected to as immaterial.

Objection overruled. Exception.

A. I endeavored to find them all, find their whereabouts.

Q. Could you find any others?

A. I could not find the whereabouts of—I could not find where any of them were except Cowert. I could not find any definite information but the ones who were resident at Honolulu, of course?

Q. State whether or not you entered suit in the New Zealand Court against the Hagey Company on this claim?

A. I did as soon—as soon as we found out we could not find where they were.

Q. What was the result of that suit?

A. I got judgment for the full amount of my claim.

Q. I will ask you whether or not this is a copy of the judgment you obtained in the New Zealand Court?

A. That is a certified copy, yes, sir.

Mr. ROBERTSON: I offer this in evidence if the Court please.

181 Mr. MCCLANAHAN: I object to it as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Plaintiff's Exhibit "U."

(Plaintiff's Exhibit "U" read in evidence.)

—. ——.

A. George Edward, Jr., this is another one of the same name as himself.

Mr. ROBERTSON:

Q. Did you ever receive or collect anything on the New Zealand judgment?

A. No.

Q. At any time after entering into the agreement upon which this suit is brought, did you receive any notice from any one of the members of the Hagey Company that they repudiated or disaffirmed in any way that agreement?

A. No.

Q. After your notification of dissatisfaction did any member of the Hagey Company offer to return to you any part or portion of the consideration which you had paid to the Company for entering into the agreement?

A. No, they did not.

Q. Did a man by the name of Ruby Dexter ever notify you on behalf of any members of the Hagey Company that they or either of

them affirmed or disaffirmed the agreement that had been made with you?

A. He did not.

Q. What was the value of the sheep run and sheep that you turned over to the Company as the consideration on your part of this agreement?

Mr. McCLANAHAN: I object to it on the ground he is not shown to be qualified to testify as to the value.

Objection sustained. Exception.

182 Cross-examination of T. M. HARRISON.

Mr. McCLANAHAN:

Q. How long have you been a lawyer Mr. Harrison?

A. Since November, '91.

Q. Were you doing business in 1897 in Auckland as attorney?

A. Yes, sir.

Q. You had an office there?

A. Yes, sir.

Q. How long had you practiced?

A. I went there in about December, '94 I think it was and was admitted a few months afterwards, had a practice from then until about——

Q. About three years?

A. Yes, sir.

Q. Had you a partner?

A. No, I was by myself.

Q. How did you happen to run against this Hagey business?

A. I met Cowert at the same boarding house I was stopping at.

Q. He was stopping at the same boarding house that you were, all through your negotiations?

A. Yes, sir.

Q. Up to the time you left there?

A. Yes, sir.

Q. Were you and he quite friendly?

A. Yes, sir.

Q. Had you known him—You said yes?

A. Yes we were quite friendly.

Q. Had you known him prior to meeting him in the Hagey business?

A. No, I had not known him prior to meeting him down there when we got into the business.

Q. And as a result of meeting him there did you go into the Hagey Institute in Auckland after meeting him?

A. Yes, sir, several times.

183 Q. And he showed you how it was done, the working of the institute?

A. Well he showed me some of it.

Q. Showed you enough to interest you in the business?

A. Yes, sir.

Q. Did you make any inquiries as to how the business was done?

A. Oh, some slight inquires. There was some things they didn't want to tell me, they said were secret. I didn't inquire very far into them but I made inquiries as far as they permitted me to do so.

Q. Had you ever been in business before your admission to the bar as attorney?

A. In business?

Q. In any kind of business?

A. I was in a bank once, in the banking business.

Q. Anything else?

A. That is all I think.

Q. And from the banking business you went into the profession of an attorney?

A. I went into the University after I had been in the bank for awhile there I studied law in the University.

Q. Well aside from secret, this about the treatment, did he answer all your inquiries in regard to the matter?

A. Yes, sir, he answered all except those which he said he wished to keep secret.

Q. What were the secret things?

A. Well he didn't want to tell me, give me the names and detail about the number—about all the patients they were treating, because he said that they didn't want—a great many didn't want to be known as patients.

Q. He didn't want you to know their names, of the persons?

A. No.

Q. That was all, was it not?

A. He didn't give the exact numbers. He gave me a state-
184 ment in round numbers?

Q. But he was anxious not to give you names because the patients themselves did not like to have it known they were taking the drunk cure?

A. Yes.

Q. What else was it he kept from you?

A. He didn't give me the information I sought. He failed to give me with regard to instructions for carrying on the business, nor did he let me know what kind of drugs he used.

Q. Be specific. What did he fail to give you, did you ask for anything that he failed to give you?

A. I asked if it were true that they used emetics only to make people sick and make people sick when they were using the narcotics that they were to be cured of, and he said it was not so.

Q. What else?

A. Well throughout the whole system of deceiving people as to what makes them sick, was absolutely not the case.

Q. Where had you heard that emetics were used in the treatment that made you ask if it were true that emetics were used?

A. Well I think he volunteered that information to commence with, and consequently I had him to reassure me on the point. He said people were accusing him of doing that.

Q. At any rate he satisfied you it was a good thing and you were willing to go into it?

A. It appeared so to me at the time.

Q. You gave up all your business to go into the drunk cure business?

A. Well for the time being.

Q. Who did the actual typewriting of these contracts?

A. I am not sure whether it was a clerk of mine or myself.

Q. Did you have a clerk?

A. I had a boy who did a good deal of my typewriting.

185 He was very expert at it. I used to do some myself.

Q. Didn't you do that yourself?

A. I can do typewriting.

Q. Didn't you do these typewritten contracts?

A. I typewrote some of them I know.

Q. Did you typewrite all the last one?

A. I think I did.

Q. The one sued on, and that was done in your office. Now when did you happen to meet Kirkpatrick?

A. Well I was introduced to him by Cowert.

Q. At the Institute?

A. Either there at the Institute or at the house, I forget which, though I think it was at the house. Kirkpatrick used to go to see him at the house. Sometimes I think he was at the house.

Q. He was a lawyer was he not?

A. They said they were both lawyers.

Q. *They said they were both lawyers.*

Q. What?

A. They said they were lawyers.

Q. Cowert and Kirkpatrick both lawyers?

A. Yes.

Q. What was it that made Cowert so anxious to show you round the place or did show you around the place?

A. He said they liked to have people come there to make it pleasant for the patients, also to have other people than patients in there so that the patient would not feel when they went in there they would be suspected as taking the cure. He would like other people than patients to be coming in and out of the place so that when patients went in there they would not be spotted as patients from the fact of their going into the house and also to make it pleasant and cheerful for them socially.

186 Q. He wanted you to patronize the institution and you went?

A. He said he would like to have me go there, that it did good in that way.

Q. Did you go in the day-time or in the evening?

A. Both, occasionally in the day but generally in the evening.

Q. How did it happen that he gave you the information that he did give you in regard to the institution, the number of patients and the work?

A. That was when we commenced to negotiate for the purchase of

territory in Tasmania, of course I made inquiries about how things were going.

Q. How long had you been going to the Institute when you began to negotiate for the purchase of your interest there?

A. Well I think I must first have gone to the place in July or August, and negotiations I don't think it lasted a month before the agreement was made.

Q. Who opened the negotiations?

A. Cowert.

Q. In what way?

A. He said he thought he had a purchaser for my sheep, if I would put the—what I got for the sheep into the Hagey business.

Q. How did he know that you had any sheep?

A. I had been talking to him about it.

Q. For what purpose?

A. Well I told him that they were a long distance off, four or five days' journey.

Q. What were a long distance off?

A. The sheep.

Q. Well what was your purpose in telling him about the sheep in the first place?

A. I don't know that I had any particular purpose except I said I would like to sell them on account of it being inconvenient for me to manage a run situate a long distance from it.

187 Q. How long had you owned them?

A. I owned them, I had half interest in them from the preceding November and I had taken over the whole interest in the preceding May.

Q. About 6 months?

A. About a year, 8 or 10 months since I had first taken an interest, bought an interest in them.

Q. November to May is how many months?

A. I have a copy of the agreement in my pocket and can give you the exact date.

Q. You say you first bought in November?

A. I can give you the exact dates if you let me look at this copy of the agreement that I have here.

Q. Well you had owned them 9 or 10 months then had you?

A. Well the first agreement upon which I bought the half interest was in December, '96, the 8th day of December, and I got the whole interest, bought out Robaison and the partnership was dissolved, and I bought out Robaison on the 4th of the following May, that would be May, '97.

Q. May '97 and then from May '97 to the date of the contract you had owned the sheep?

A. I had owned the whole interest from that date, yes.

Q. What was your reason did you say for wanting to sell?

A. Because I was so far away it was inconvenient for me to manage a run at that distance.

Q. Had you made any money out of them?

A. I had not made a wool clip.

Q. What?

A. No, I had not made a wool clip, *I had not made a wool clip.*

Q. As a matter of fact you paid five or six hundred Pounds
188 for the half interest, did you not?

A. I paid about 700 Pounds for the half interest, yes. Then I put on about 2500 sheep after that which cost me four or five hundred Pounds, besides buying out Robaison's interest which cost me five or 600 Pounds. It cost me altogether between 1700 and 1800 Pounds.

Q. Had you ever been in the sheep business before?

A. No, not before I bought in with Robaison. I don't think I had any very considerable number of sheep, never had much to do with sheep.

Q. How old a man are you?

A. I am 38 now.

Q. What was it that led you going into the Hagey business and disposing of your other investments?

A. Because Cowert said he had a customer, to take it off my hands and I wanted to get out of Auckland, the business was flat then.

Q. What business was flat?

A. All.

Q. Was the sheep business flat also?

A. No, the——

Objected to as incompetent and irrelevant. Objection sustained.

Mr. McCLANAHAN: Go on with your answer.

Mr. ROBERTSON: I move to strike it out.

The COURT: The answer may be stricken out.

Mr. McCLANAHAN:

Q. Was it because that all business was flat that you went into the sheep business and bought these sheep?

Objected to as incompetent, irrelevant and immaterial. Objection sustained.

Mr. McCLANAHAN:

Q. Mr. Cowert knew that you wanted to dispose of your
189 sheep business?

A. Yes.

Q. And he informed you that he had a customer for the sheep is that it?

A. Yes.

Q. Did he say who the customer was?

A. Not at first.

Q. Had you met that cus-omer at that time?

A. I didn't know who the customer was at first.

Q. Had you met the customer at that time?

A. Well the customer afterwards turned out to be Mr. Ables. I had met him at that time.

Q. You think you had met him?

A. I was introduced to him by Cowert I think.

Q. Whereabouts?
A. At the Institute probably.
Q. What was his connection with the Institute?
A. He was one of the officials conducting it.
Q. Well be specific, what was he doing there, what was his duties?
A. Well I think he was treasurer and he was tending to patients and that sort of thing.
Q. What did Cowert and Kirkpatrick do?
A. Well, they seemed to be hunting for patients and tending to them and looking after affairs generally.
Q. Hunting for sheep ranches?
A. Well, I don't know. I have told you, I have told you all I know about it.
Q. When did you first speak to Mr. Ables about this suggested trade?
A. After Mr. Cowert had informed me that Mr. Ables would take the sheep from me at that valuation if I would go into the Hagey business.

Q. Now Mr. Cowert had informed you that he could find
190 a purchaser for your sheep; did he know the value of your sheep or the price of your sheep?
A. He did, I told him What I would take for them.
Q. In a trade?
A. No, cash.
Q. Did you tell him what you would take for them in a trade?
A. I only put a cash value on them.
Q. Well but you were going to trade were you not into the institute, have an interest in the Institute?
A. I told him the cash value and he wanted me to put that into the Institute.
Q. Well that is what you knew when you placed your cash value, your cash value on the sheep that that was going to be turned in for an interest in the Institute, did you not?
A. He said he would give me the market, and he would give me an interest in the Hagey business for that cash value, the same cash value as I put on the sheep, give me cash interest in the Hagey business for that value.
Q. When you put your cash value on those sheep you knew that you were going to get for them or for it an interest in the Hagey business?
A. No, I put a cash value that I would sell the sheep for, my lowest cash value and he wanted me to take it out in Hagey—in the Hagey business, of the same cash value. I didn't offer——
Q. And when you placed your cash value on the sheep you didn't know that you were going to trade the sheep for an interest in the Hagey business?
A. Well he said to put the lowest cash value I would take for them, and then he asked if I would take in lieu of the cash an interest in the Hagey business of that value.
Q. Is that the first time that the interest in the Hagey business was suggested to you, or did you know of it prior to that time?

A. No, he said that he wanted to know the cash value, what
191 I would take for cash, before he had offered an interest in the Hagey business. First, he wanted to know what my lowest cash price would be, and then he suggested my taking an interest in the Hagey business of that cash value.

Q. Had you not commenced yourself to become interested in the Hagey business at the time that you had placed the value on your sheep.

A. No, I put the value on my sheep before I knew anything of the Hagey business.

Q. Before you knew anything of the Hagey business; then what were you pricing your sheep to the Hagey men for?

A. Because he offered to buy them from me for an interest in the Hagey business.

Q. He knew you had some sheep and offered to buy them from you for some interest in the Hagey business, is not that it?

A. Yes, sir.

The COURT:

Q. So that you did know at the time you put the cash value on these sheep that he wanted to give you in exchange for them this interest in the Hagey business?

A. No, he asked me what I would take for cash, first, then when I told him what I would take he made a proposition about the Hagey business.

Mr. MCCLANAHAN:

Q. Was this talk about the value of your sheep and exchange for your sheep and interest in the Hagey business at one conversation?

A. No, it ran through several conversations.

Q. You had become quite intimate with Cowert had you not?

A. Well we were sitting at the same table in that boarding house and we often talked about it.

192 Q. Well now, Mr. Harrison, is it not true that you interested yourself in the business and had offered to Cowert to go into the business if you could dispose of some sheep that you had?

A. No, it was his proposition that I should dispose of the sheep to his customer and go into the business.

Q. And when he did that he knew that you wanted to go into the business?

A. He knew that I wanted to go—sell the shepp because I told him, and what I would take for them.

Q. And knew that you wanted to get into the business?

A. No, I don't think he knew that. I would rather have the cash than go into the business proposition, but it was he who wanted me to go into the business. He didn't know that I was anxious about it.

Q. How long had your sheep been for sale?

A. Well after I got the title to them I wanted to get rid of them, as soon as I had a good opportunity for putting them on the market. I didn't consider that I had a good opportunity all that winter. It

is winter down there when it is summer here; July and August is winter months, and it was not a time when I could show anybody or sell. I thought I would have to wait until the following summer when the sheep were rounded up before I could sell them properly, before I could show them to a person in any way that one could get at their true value at the time. I had not been anxious to sell the sheep all through the winter, although they were for sale if I could get a reasonable price.

Q. Did Cowert know where the sheep were when he offered to sell them for you?

A. I told him where they were.

Q. Did you tell him how far they were from Auckland?

A. I did.

193 Q. What kind?

A. Yes.

Q. And what did he say about all this information about the sheep; want to look at them?

A. Yes sir.

Q. Did he look at them?

A. No.

Q. Why not?

A. Well he said he would take my word for it.

Q. Is that all he said, I will take your word as to the number of sheep and the kind of sheep?

A. Well, it was first of all arranged that I and he or one of them should go up and look at the sheep, and they said that they thought it would be all right, they would take my word for it.

Q. What kind of a man is Cowert? a countryman of yours, an Englishman or an American or what?

A. He told me he was an American came from Texas.

Q. You also had a lease that was going with this flock of sheep?

A. Yes.

Q. Did you tell him about the lease?

A. Yes.

Q. What did you tell him about the lease?

A. I told him that Grace had the lease and he wanted to sell it to me at a price and that the Government had informed me that they would not put the land up for sale, either for lease hold sale or free hold sale, without Grace's consent, that Grace's lease was practically an indefinite one, and that he had spent a lot of money in getting his title to the land, but the Government, when I requested them to give me a definite 21 years' lease, had said that they would not without the—change the title to the land without Mr. Grace's consent, or without Mr. Grace's assignee's consent.

Q. Now what kind of a lease was this you had been telling Mr. Cowert about?

194 A. It was a year to year lease which the Government would not—which the Government refused to change except at the holder of the lease—that is, the Government were not prepared to change the tenure unless the holder of the lease wished it changed.

Q. The tenure was then from year to year?
A. And as long as the holder of the lease wished to keep it so.
Q. What is that?
A. From year to year for as long a time as the holder of the lease wished to keep it so. That was not in the lease but the Government informed me that that was their position in the matter.
Q. I see that was not in the lease?
A. The Government man who informed me as to the Government's position, had authority to make agreements of that kind by act of the Auckland legislature.
Q. You say that Grace had signified his intention of selling it to you?
A. I had an agreement from him that he would sell it.
Q. Had you already promised to sell it to Cowert——
A. I told him——
Q. Wait a minute. Did you get it from Grace?
A. No, I had an agreement that Grace would sell it to me and I undertook to put the Hagey people in the same position I was in. Grace would sell it to me or any assignee of mine for the same terms.
Q. Did you show Cowert or Kirkpatrick any of the leases?
A. I think I showed them a copy of the documents I had.
Q. Do you remember what the rental was of the lease?
A. I think I have a copy of it here.
195 Q. Refresh your memory then from the copy of the lease?
A. It was 60 or 80 Pounds a year, I am not sure which No, I have only got a copy of—what is this—No, I have only a copy of Grace's agreement to sell the lease. I have—I forget what the exact rental was. It was not worth much on account of the amount of money that Grace—it had cost him to get the lease originally—the Government gave it to him cheap.
Q. This is all that Cowert required of you, to know what you have stated about the lease and about the sheep?
A. I told him all that I knew.
Q. What is that?
A. I told him all I knew.
Q. You have told the jury all that you told him?
A. All that I remember.
Q. And he said it was all right he would take your word for it?
A. Yes sir.
Q. Well, now, when did he report to you again Ables' willingness to take these sheep?
A. Well before he said it was Mr. Ables had agreed to take the sheep, they were intending to send a man up there along with me or one of themselves to go up and look at the sheep, until the last moment, and it was only shortly after the final agreements were signed that they decided to dispense with viewing the sheep. I told him all that I knew about the sheep, much more than I remember now.
Q. Did you have a talk with Ables before the trade?
A. Yes, sir.

Q. What talk did you have with him?

196 A. The first conversation with him, I asked if he was getting out of the Hagey business and going to take the sheep an- he said he would rather *a*have the sheep run, that he had difficulty with his partners and if he could get the sheep he would be willing to take the sheep.

Q. He evaded your question?

A. He said he was willing to take the sheep.

Q. He evaded your question?

A. He evaded my question. He told me he was going to go out of the Hagey business and take the sheep in lieu of his interest. That is what he told me first.

Q. What did he tell you second?

A. After I came back from Sidney the first time he told me he had made different arrangements.

Q. Tell us all that he told you about entering into the business?

A. That is all that I remember. I asked him if he was satisfied with the arrangement and he said he was, that is the arrangement set out in the agreement.

Q. That is before the first contract was signed?

A. Yes, sir.

Q. Did you have any other conversation with Ables?

A. Most of my conversations were with Cowert, and Kirkpatrick but I made a practice of talking with Mr. Ables and finding out if he had agreed to what they said he had agreed to.

Q. Answer my question, if you had any other conversations?

A. I had several conversations.

Q. After the first conversation; just relate what those conversations were?

A. Yes, sir, I had several conversations.

197 Q. You had three?

A. Well, I don't think very many, I don't remember what they were. Most of my conversations were with Cowert and Kirkpatrick, but I made a practice when they said Ables would do a thing in connection with this matter of seeing Mr. Ables and asking if that was so and he invariably assented that it was. I didn't have much conversation with Ables.

Q. Your dealings were with Cowert and Kirkpatrick?

A. Yes, sir.

Q. Principally. When you made this contract, taking into consideration the statements made by Cowert and Kirkpatrick in regard to the Hagey business you had satisfied yourself as to the advisability of the trade.

A. Under the terms of the agreement, that they would give me stock of the market value of 2000 Pounds, if I was dissatisfied.

Q. You thought——

A. I thought that was very necessary.

Q. You thought that abundant protection?

A. I didn't know the nature of the business and I thought it would be proper.

Q. They didn't know the nature of your sheep business did they——

A. Yes, I did.
Q. Except what you had told them?
A. I knew all about the sheep, I had seen them and handled them and spent weeks up there.
Q. They had opportunity to know all about the thing that they were trading you?
A. They did.
Q. So you thought you would protect yourself by putting in clause 4?
A. Yes, sir.
198 Q. And could afford to take chances on the proposition?
A. I though- the people were good for the money in case the Hagey business did not turn out satisfactorily.
Q. Who was it that represented, if any one, that they were good for the money?
A. Well I think they all represented it.
Q. Who?
A. Well, I think that all that I spoke to about it and I spoke to Ables, Kirkpatrick and Cowert and Kirkpatrick too, also Ables, and I think they all informed me that they were good for it.
Q. Good for what?
A. 2000 Pounds, stock of the market value of 2000 Pounds, that said that they would have to hold that on hand, for their own partnership agreement for that amount, in regard to Auckland, to pay it, that they would have to hold what they might have to pay during the six months that the option remained open.
Q. As a lawyer, did you ask then to see the stock that they had? You said they would have to hold the stock, now what stock did they refer to? Did you ask them to let you see the stock?
A. They said that they had an interest more than that value in a new company formed to work in New South Wales.
Q. They had what?
A. They had stock of more than the market value of 2000 Pounds in a new company they had formed to work in New South Wales, and they would save a one fifth interest in that with 5000 Pounds cash.
Q. You knew that didn't you?
A. I was informed so by several people.
Q. You inquired before you made your contract?
A. Yes, sir.
199 Q. And found that was true?
A. They had saved a one fifth interest in New South Wales.
Q. Did you find that out that they had any other stock that you could get under the 2000 Pounds contract?
A. They said they were going to form a lot of companies and they would have plenty of stock on hand before the six months was up.
Q. They had not formed these companies but were going to?
A. Yes, sir, they said they had private stock of their own.
Q. In what?
A. In various things, that they had made money and that money was invested in stocks down there which they were holding.

Q. Who said that?
A. Well, I know Kirkpatrick did for one.
Q. And it was the intention to give you 2000 Pounds of any kind of stock?
A. Of any kind of stock if I were dissatisfied.
Q. Bank of England stock?
A. Any kind of stock.
Q. Did Mr. Ables say that he had any stock?
A. I don't remember whether Ables said that or not; Cowert and Kirkpatrick did; Cowert was the one that I had most of the dealings with.
Q. Now if they were going to give you any kind of stock what did you put in the expression "in some other field of the Company's operation" for?
A. They put that in.
Q. Well, you signed the contract?
A. They put that in, *that* wanted it put in in that way.
Q. As a matter of fact Mr. Harrison it was understood that if you didn't like this particular field you could have the same
200 interest in some other field if you were dissatisfied?
A. I could have an interest of the market value of 2000 Pounds, something that you could sell for 2000 Pounds.
Q. In some other field?
A. They said they didn't know where they would be at the end of six months and they didn't know where the money would be invested but they would have property at different places in the field of operation that they might be in and at that particular place they were prepared to offer the stock wherever they might be.
Q. That was the understanding, if you didn't like Tasmania you could go to some other field of operation?
A. They would be in some part of their field of operation outside of Tasmania, if Tasmania wasn't satisfactory, and at that place, wherever they were would be holding stock and they would give me stock of that market value.
Q. In that Company?
A. No, they would give me stock of the market value——
Q. Why did you put in the Company's field of operation?
A. Because they would be somewhere in the Company's field of operation. They said that they wanted to have the option of giving it to me at any place they might be.
Q. They might be holding bank stock in some town other than Tasmania and they, if you desired, could give you that stock?
A. They could give me that stock. They had the option of selecting what stock they would give me, the only qualification it had to have was, that it would have to have the market valuation of 2000 Pounds.
Q. Did the Company stand well in Auckland?
201 A. Well, it did at that time.
Q. At the time you made the deal?
A. Yes, sir.
Q. Any patients at the Institute?
A. Yes, sir.

Q. Did you see any cures being perfected?

A. They told me of one or two people that they had treated successfully.

Q. Did you investigate the truth of that statement?

A. I found that they had sobered them up.

Q. This contract was formerly signed, as now sued on, on the first of October?

A. Yes, sir.

Q. 1897?

A. I don't think Gilmore signed that day, I think Gilmore signed the day after the rest of us signed it.

Q. The first two contracts did not require you to stay in Tasmania five or six months trying the business?

A. The first two.

Q. Why was it—who was it that put in the words there "on or before"?

A. I said I wanted it so. Besides I didn't wish to be obliged to remain there five or six months, and I wanted an option of going away as soon as I could make it go and suggested those two words "Or before" should be put in and Cowert said, I r-member, at the time now "Harrison if when you get those instructions if you come straight back I will never forgive you."

Q. This fund of 200 Pounds was raised before you left was it not?

A. Well it was sent to me, their share of 110 Pounds that they paid was sent to me at Sidney along with the instructions and the medicines.

Q. When did you contribute your 80 Pounds in cash?

A. Well, I contributed it, I put my share in I suppose as
202 soon as we got to Tasmania. I didn't keep my own moneys—
I didn't separate my own portion of the money from my private funds until we got to Tasmania.

Q. Who was the custodian of this 110 Pounds?

A. I was until the 11th of February when I handed it over to Gilmore.

Q. Until when you got where?

A. I say until the 11th of February, '98 until I handed it over to Gilmore, I had spent most of it.

Q. When you got the 110 Pounds did you take 80 Pounds of your money and keep it separate?

A. I did not keep it separate, I did not add my money to it until I got to Tasmania.

Q. When did you get Gilmore'- 10 Pounds?

A. Gilmore never paid his 10 Pounds. It was deducted from his salary.

Q. That was in violation of the contract was it not?

A. Well was never paid in cash, that is the point.

Q. What did you pay yourself in cash?

A. I paid 40 Pounds of it in cash.

Q. Didn't you state upon your direct examination that you paid $80 in cash?

A. I deducted 40 Pounds being salary. I don't think I advanced more than 40 Pounds in cash because there was 40 Pounds salary coming to me.

Q. You broke the contract when you did that, did you not?

A. Not at all. The fund was raised to start the business and salaries had to be paid out of it.

Q. Salaries were to be paid out of receipts from the business after payment of expenses, were they not?

A. They were to be a certain charge on the business.

Q. Then you broke the contract did you not when you took
203 the *the* salary out before there were any receipts?

A. No.

Q. Explain why you didn't?

A. They insisted on O'Brien's salary being paid out of that fund and I didn't know why the rest of ours should not.

Q. Why didn't you break the contract when you took your salary out of that fund to establish the business before there were any receipts?

A. I didn't consider I broke the contract. They insisted on O'Brien's salary being paid out of that fund and I considered the rest of us was in the same position. It was understood our salaries were to come out of the fund if the receipts of the business did not furnish them.

Q. How many salaries were paid to you out of this fund?

A. I think I only got one month, 40 Pounds.

Q. You say you got that at Sidney?

A. No, I got it at Hobart. I gave a statement—there is a statement of how the funds were disposed attached to Gilmore's deposition. It is a statement I prepared at the time I was leaving Tasmania, at the time I handed the balance over to Gilmore, the balance over to Gilmore.

Q. But you were longer in the business than one month?

A. Only in Tasmania one month. Gilmore was there before.

Q. But still you were drawing your salaries?

A. No, I only drew one month's salary at the time I was in Tasmania.

Q. Didn't Gilmore draw another month?

A. Gilmore claimed another month, and I didn't give it to him but I have him half of it afterwards out of my own pocket.

Q. He made you pay that before he would testify in this case didn't he?

A. Yes before he would sign his deposition. He said I
204 promised to pay it. We settled for half of it finally.

Q. Did you know anything about the treatment of patients before you got these instructions?

A. Nothing more than what they told me that it was a sure cure and they had very small percentages of relapses.

Q. Did you know anything about the treatment of patients before you got these instructions?

A. They told me that they gave them a tonic 8 times a day and hypodermic injections 4 times a day.

Q. What kind of tonics?

A. Some simple remedies that they had unknown to the medical profession.

Q. That turned out to be true didn't it?

A. No the medical profession seemed to know all about it.

Q. How do you know that?

A. The Doctors told me that the ingredients of the Keeley Gold Cure were published in the papers in Chicago and set out in the medical books.

Q. You assumed that the same formula that these gentlemen had and made money with and which they said was secret was the same formula as the Keeley Gold Cure?

Q. They told me it was practically the same as the Keeley Gold Cure.

Q. What is your basis for saying it was known to the profession, from what they stated?

A. The doctors told me so.

Q. How did you know what to tell them so that you could say what was known?

A. They told me the ingredients used in the Keeley Gold Cure and said I would find them the same when I received those instructions.

Q. Did they tell you the ingredients used in the Hagey Business were known?

A. They said I would find them the same——

205 Q. How could you find them the same?

A. If it were like the Keeley Cure it was known to the medical profession because they said it was practically the same as the Keeley Cure.

Q. You saw the treatment being administered, did you at the institute?

A. I saw that after I returned from Sidney the first time, I saw some patients treated.

Q. Did you see it before you went?

A. I don't remember. I had seen some patients take their tonic. I don't know whether I had seen the injection.

Q. Did you see Mr. Ables give some injections?

A. I did after I returned from Sidney the first time.

Q. Before, before you signed the contract?

A. No, after I signed the contract, before the 17th January.

Q. Did you see him do it before?

A. I don't remember seeing him do it before. Gilmore was up there I believe but I don't think I was.

Q. Well, now, how did you know what the Keeley Cure was?

A. Before when I went to Sidney, I told—I met a man there that I had known in Canada and told him what I had gone into and that I was to get these instructions and medicine by the next steamer, and he said, why, I was in the Keeley Cure some place in St. Louis, and took treatment there, and I afterwards helped to treat patients and he said the whole thing is a dope, when they give them a drink of whiskey they give them something to get them sick and tell them it

is the whiskey that makes them sick and they give them a few tonics to brace them up.

206 Q. This was the first——

A. This was between the time that I left Auckland on the 4th or 5th of October while I was at Sidney before I received the instructions. He told me that I would find by the instructions they used emetics, and told the patients that the effect of the emetic was the effect of the whiskey.

Q. So you were being deceived already?

A. I told them that there was nothing of the kind in the treatment, that they had assured me that such was not the case and he said I would find out when I got the instructions.

Q. And did you find out?

A. I did find out, yes.

Q. And that is all you know of the Auckland cure?

A. Well, that was the first I had been told I remember of being told that emetics were being used in the Keeley cure.

Q. I am asking you if that is all you knew of the Keeley cure?

A. I talked to doctors about it since then.

Q. At the time you signed the contract?

A. Later I had heard about the Keeley Cure from other people.

Q. Favorably or otherwise?

A. Well I don't know that—that—I heard that it was a going concern in the States and I have never heard of it being successful in any way before in the British Empire.

Q. And these men said it was like a Keeley cure?

A. Yes, they said it was a great success in the States and they told me a lot about it, that they had been successful with this cure, for instance and made a lot of money.

Q. Did you ever hear of the Keeley cure except what they told you?

A. Yes, sir, I had heard of it in the States before I ever went to Auckland.

207 Q. Successful or not?

A. I heard that some people had been permanently cured by it and others were not.

Q. Did these men represent that this was a permanent infallible cure for drink?

Q. They represented that a very small percentage of people they treated ever relapsed and it put them in the same position that they were in before they ever took to drink.

Q. And that it was very much like the Keeley cure?

A. And that it was very much like the Keeley cure.

Q. You were looking then when you got these instructions you were looking for confirmation of what these men told you about emetics?

A. I did not believe I would get confirmation about it and tried.

Q. But you did look for it, looked to see what was there?

A. Well I saw the instructions and concluded that he was right certainly.

Q. Well, now, what was your objection, Mr. Harrison, to the giving of emetics?

A. Well, I don't think that the business would be successful, I didn't think there was any secret about it, I considered the medical profession would consider it a sort of humbug, and it wouldn't be successful the way things were going in Tasmania, and as a matter of fact it was not the secret that it was represented to be.

Q. That is was not the secret that it was represented to be and that it would not have the infallible curing effects that these people represented it would have on account of the use of emetics?

A. As emetics were the only thing used were the chief things used to restrain people from using the narcotics.

Q. You mean to say that simply because the instruc-
208 tions called for the use of an emetic that you concluded that you could not make a success of it?

A. From that and from the fact that I did not have—yes, from the fact that the emetics seemed to be the only means used for breaking the people of the habits of which they wanted to be cured, I did not think it would be a permanent success.

Q. Well, now, you say it was a success in Auckland, did you not?

A. It straightened people up for a time, I saw that.

Q. Did they relapse before you went away?

A. Some of them had but I don't think many of them had at that time.

Q. So you knew when you entered into the contract that some had relapsed?

A. I knew that there had been a case or two of relapses.

Q. So you knew that at the time when you entered into the contract?

A. Not at the time that I assented to the contract, but between the time of the signing of the contract before the time I left I knew there had been a case or two of relapses, in fact, Robaison had been down to see me off the night before the 4th October and he told me some story about some relapses. He told me I had been taken in.

Q. Seeing you off where, where were you going?

A. When I went to Sidney the first time.

Q. Where were you going?

A. I was intending to start for Tasmania.

Q. That is where you were making for?

A. Yes, sir.

Q. What was the date of that?

A. About the 4th October 1897.

Q. Had Gilmore started yet?

209 A. No, Gilmore was to come a few weeks afterwards.

Q. So that was the time you started to carry out this contract and departed for Tasmania?

A. Yes, sir, that is the first time, I came back after I got the instructions.

Q. So that you had the right to become dissatisfied from that day any time within six months with the condition of the business in Tasmania?

A. Well, I did not consider that I really started for Tasmania until the 17th of January, for the simple reason I intended to go to Tasmania, it ended up in a false start and I came back before I got there.

Q. You just testified that you——

A. I intended to go.

Q. And started with the intention of going?

A. But I did not carry out that intention.

Q. Is not Sydney on the way to Tasmania?

A. Yes, I came back from Sidney.

Q. You got as far as Sidney. How far is that from Auckland?

A. About 1200 miles.

Q. You got 1200 miles on your journey to Tasmania?

A. Yes, sir.

Q. That was a false start was it, the 1200 miles?

A. Well I never got to Tasmania.

Q. Well, you got 1200 miles nearer than from where you started?

A. I have to get to the place before I can say I started for it.

Q. How far is it from Sidney to Tasmania?

A. About another 1200 miles to Hobart.

Q. Only 1200 miles more, is not that right?

A. Well it is 600, it depends which way——

210 Q. You go?

A. It is 11 or 1200 miles—about 18—800 miles overland, 8 or 10 by overland and 13 or 1400 miles by the direct sea route.

Q. From where?

A. From Sidney to Hobart.

Q. How long did you stop in Sidney?

A. Until I received the instructions, about a week or 10 days, about a week I think it was I got back——

Q. You have spoken of the deception as revealed by the instructions?

A. Yes.

Q. Did the deception so practiced upon you please you?

A. It certainly did not, it made me very much dissatisfied with my bargain.

Q. Was that one of the reasons you wanted to get out of it?

A. Well it is—it made me dissatisfied with the bargain and that was the reason I went back to Auckland to get—try and get relieved of the bargain, certainly.

Q. You didn't want to be a party to what you called a humbug?

A. I don't think the business could be made successful.

Q. Answer my question, please.

A. Not unless I tried it and it would turn out much better than I could anticipate I don't want to be a party to it.

Q. If it turned out to be financially successful you were willing to be a party to the humbug?

A. If it turned out and cured people as well as they represented it would cure people I should certainly have thought it was worth practicing.

Q. You know that it don't cure infallibly?

A. They had not told me so; as I said, I heard of one or two cases that had relapsed before I left.

Q. And if it was not successful financially you didn't
211 want to be a party to the humbug?

A. I didn't want to be a party unless the thing could be made to do what it was represented to be.

Q. The question then for you was dollars and cents?

A. A question of dollars and cents and also of making an honest contract with patients. I didn't want to treat patients unless I could cure them.

Q. You didn't want to make a dishonest contract with your patients

A. No.

Q. And you thought under your instructions that your contract would be dishonest with your patients?

A. Not necessarily.

Q. What did you use the word "Dishonest" for in connection with your contract with the patients, what did you mean by that?

A. Unless the thing turned out to be as good and cured as they represented it I should not have liked to carry on the business.

Q. What did you mean by making a dishonest contract?

A. If I afterwards found it would not cure them I would not make a contract with patients to cure them when I knew it would not do it that is all.

Q. You were then convinced, were you not, after reading those instructions and after listening to the rumors in the air that the contract with the patient would be a dishonest one?

A. No.

Q. Why not?

A. Because if I found out from the instructions everything to be correct as the Hagey people represented and they could cure patients
according to those instructions, the contract would be quite
212 honest I should say.

Q. In other words you thought the misrepresentation would be justifiable if you could cure a man?

A. If they could cure him as they said they would cure him so that he would never have any desire to go back to it.

Q. Did you think that at the time you read the instructions that the misrepresentations would be justifiable if you could cure the man?

A. Well, I don't remember what reflections I had on that point.

Q. We would like to know just how you felt about the matter at this particular time?

A. I didn't think the treatment would do for patients what they had been representing at Auckland it would do for them, that a man that was cured in that way would be cured from the desire to return to the habit, he might think he was for a little while.

Q. Mr. Harrison, did your view of the efficacy of the whiskey treatment ever change?

A. Which view.

Q. The view you have been giving to this jury that it was a humbug?

A. After the—after I had received the instructions?

Q. Yes, did it ever change after that?

A. No, I don't know that it is materially changed.

Q. As a matter of fact you went back to Auckland and tried it on a cook, didn't you and demonstrated that it was a fraud from beginning to end?

A. I didn't succeed in curing him.

Q. What?

A. I didn't succeed in curing him.

Q. Well, you went back there to demonstrate whether it was *bona fide* or a fraud?

A. Well, I tried to the best of my own ability to cure the
213 man but didn't succeed.

Q. What did that do, or didn't that strengthen your disbelief in it?

A. Well it certainly wouldn't strengthen my belief in it.

Q. How long had you been in Auckland before you tried this treatment on this cook?

A. Well, I got back to Auckland about the 1st of November and it was sometime between that and Christmas that I tried it on the cook.

Q. What made you try it?

A. Well the lady of the house said she had a cook and he was in the habit of going on a spree and she would like me to try and fix him up, she would do all that she could to make it pleasant for him at the house and I could give him the medicine.

Q. Did you give him an emetic?

A. No, I didn't give him any emetic.

Q. You tried the honest way of treating him without misrepresentation?

A. After a few doses he went on a spree and wouldn't take anything. He said he didn't want to be made sick.

Q. You didn't make him sick?

A. He would not give me a chance somebody had told him.

Q. What was your reason for this experiment?

A. Well, I just wanted to try the effect of it, effect of the treatment.

Q. What was your reason for going back from Sidney to Auckland?

A. I wanted to get free of the contract and get my sheep back.

Q. And you considered at that time you had become dissatisfied with the condition of the partnership business?

214 A. I was dissatisfied with the thing as far as it had gone.

Q. Please answer my question?

A. In so far as the business had gone I was dissatisfied.

Q. Under the terms of the contract you had become dissatisfied as you had a right to become?

A. Well, I considered I had a right to become dissatisfied at that time.

Q. So it was on that theory of the contract that you went back to demand your 2000 Pounds.

A. I went back trying to get out of the contract the best way I could.

Q. Didn't you demand the 2000 Pounds when you went back?

A. Or the sheep.

Q. Leave out the "or," didn't you demand the 2000 Pounds?

A. Yes, sir.

Q. So you were acting under your contract when you went back?

A. Certainly.

Q. Were you acting under legal advice?

A. I consulted two or three lawyers about it and got their opinions.

Q. Where?

A. At Auckland.

Q. Who?

A. Well, the first of all I spoke to was Mr. Carter and I went to Parr.

Q. Before or after the instructions came?

A. After the instructions as to what they—what my exact right was.

Q. Why did you go from Carter to Parr?

A. Well Mr. Carter and I didn't get along as well together as I and Mr. Parr.

215 Q. Why not?

A. For various reasons.

Q. Didn't Mr. Harrison, didn't you want Mr. Parr to bring an action for you on the contract and he would not do it because you had not done your part?

A. He said that he did not think—he thought I ought to go and give it a trial before I should bring action although he had no doubt that the facts were as I stated, it would be very difficult for me to prove these people had represented the nature of the business to be different from the instructions under it, on that ground he thought I ought to give it a fair trial before I should pass upon it.

Q. That was the cause of your going to some other attorney?

A. Then I talked it over with Parr.

Q. Mr. Carter's advice didn't meet with your wish to bring action at once?

A. Well, I didn't know whether to bring action at once or go and try it. I wanted to get the matter settled.

Q. You wanted to settle the matter before you gave notice of dissatisfaction and consulted your attorney?

A. I wanted to get out of the contract, either to get my sheep back or to get the money out of it, the best way I could.

Q. So after you got those instructions you began to act under medical advice?

A. I took advice as to what they thought my rights were, I didn't care to rely upon my own judgment in a matter in which I was so largely interested.

Q. Mr. Parr told you?

A. Well Parr said he would bring action but he said he thought it would be difficult to prove misrepresentation and he thought it would be better for me to go and give the thing a trial—and make sure what it was really worth.

216 Q. Well did you do that?

A. I did.

Q. I thought you went back to Auckland?

A. I went on to Tasmania when they finally refused to return me the sheep.

Q. No, I am talking about Mr. Parr's advice to you at the time just after the receipt of the instructions?

A. Well I had to go back to Auckland before I saw Mr. Parr, Mr. Parr was at Auckland.

Q. Mr. Parr was out at Auckland?

A. I didn't take any legal advice in Australia.

Q. Before going back to Auckland from Sidney you say you went to Mr. Carter?

A. Yes, sir.

Q. The first time, before ever you telegraphed to people that you thought might buy the sheep not to buy them what was that for?

A. Because when I opened the instructions I thought that those people if they had played a trick of that kind on me would try to put the property in such a way that I could not get at it. I had no idea that Mr. Ables had wanted to sell the sheep before I went to Sydney. But when I saw the instructions I concluded that they must rely upon putting their property in such a position that I could not get the money out of them or I would never have gone into the agreement, so I telegraphed to people not to buy the sheep, that I was returning.

Q. When you sent these telegrams you still had no other information on the question of the purchase of the sheep by Ables *and* the information you first had, namely, that he was going to buy the sheep and run the ranch himself?

A. I had that idea.

217 Q. And in spite of that fact you still thought it a proper thing to telegraph the people over the country not to buy the sheep?

A. And what I could not understand, how he entered into such an agreement with me if they thought that I could collect the money of them because they must have anticipated that I would be dissatisfied, so I concluded.

Q. And you accommodated them and you became dissatisfied??

A. Well, I thought they must know that I would be dissatisfied before long with the thing, with the price I paid for it, and having talked the matter over I thought the only thing to do and action to take would be to get the property, get the sheep, I could not attach it, so I telegraphed to stop the sale of the sheep so that I could get hold of them.

Q. Where did you meet Robaison, Wellington?

A. At Wellington, New Zealand.

Q. And he told you that he had bought the sheep?

A. Yes, sir.

Q. He was the fellow that knew more about the sheep than anybody else did he not?

A. He was the man that I bought the sheep from. I don't know whether he knew more than anybody else; he knew all about them.

Q. Didn't he run a ranch?

A. He ran the Ranch himself.

Q. He knew more than you did or anybody else?

Q. There were other men that had run the ranch besides him.

Q. Under him, was it not?

A. There was a partner ran it along with him.

218 Q. It was his business at that time, sheep raising?

A. Yes, sir.

Q. And he told you he had bought the most valuable thing that you had, the sheep?

A. For the price of the wool on their backs that he got.

Q. You didn't say that in your direct examination?

A. He told me, you have sold them for the price of the wool on their backs.

Q. What was their price?

A. Because he told me it was worth that, you should get 500 Pounds cash, that they had that much wool on them.

Q. He thought he had a good thing?

A. Yes, sir.

Q. Mr. Harrison, didn't you hear Mr. Ables say that he got the names of people after the trade to whom to write as possible purchasers for the sheep?

A. He is altogether mistaken, he got from me the names of people who knew something about the sheep if he wanted to inquire about them.

Q. Who were these people that you telegraphed to?

Q. I think I telegraphed to one Jansen at W. the fellow with Jansen & Co.

Q. Had you given their names to Mr. Ables?

A. I told him that they had purchased the wool the last year's crop.

Q. Who else did you telegraph to?

A. They were also the people, they were the commis-ion merchants who sell that class of sheep, they were the right people to go to if the sheep were to be put in the market, if they were to be auctioned.

Q. Who else did you telegraph to?

A. I think I telegraphed to a man named —— —— who is about 40 miles from our run, on the neighboring run and knew

219 something about the sheep.

Q. Robaison laughing in his sleeves that he had got such a good trade?

A. He was.

Q. When you got back to Auckland why was it that you stopped there so long before starting on again?

A. Because they said they would get the sheep back for me.

Q. Get the sheep back from Robaison?

A. Yes, sir.
Q. The fellow that had got the good trade?
A. Yes, sir.
Q. And you believed that, did you?
A. They said they were willing to lose a few hundred Pounds in order to give me my sheep back.
Q. Answer the question?
A. I doubted it very much but thought they might.
Q. But it was on that statement that you staid in Auckland so many weeks?
A. I staid until the 17th January, from about the 1st of November to the 17th of January.
Q. From about the 1st of November?
A. Yes, to the 17th, 1st of November until the 17th of January.
Q. Two months and a half and more?
A. Yes, they kept me there saying they were negotiating and they thought they would manage it.
Q. How did they keep you?
A. By practically promising to get the sheep.
Q. Who were the men that promised?
A. Cowert and Kirkpatrick, chiefly.
Q. Did they *rp*omise to give you back the run?
A. They said they would get the thing back.
220 Q. You thought that so, that they would get back the run?
A. They said they would get back the whole thing, that I had signed a deed for, and place me as I was before.
Q. In these two months and a half did you have occasion to see Robaison the purchaser of the sheep and run?
A. I don't remember if I saw him during those two months and a half or not.
Q. Did you write to him?
A. I had some communications from him. I am not sure whether I communicated with him or whether Cowert showed me the communications that he had received from him.
Q. Were you doing anything during the few months that you were waiting for them to get your sheep back?
A. Robaison wanted 1000 Pounds for his bargain.
Q. Answer the question please?
A. Well I was waiting I went up to have a look at the sheep to see whether any of them had been taken; if they were in same condition as they were when I sold them, or anything had been done.
Q. You did nothing but wait?
A. We were consta-tly having meetings in Mr. Parr's office and other places and they promised to get the sheep back at a certain date and we would wait for that date, and they would promise to get them back at a later date.
Q. Was Mr. Ables up at Mr. Parr's office?
A. I think Mr. Ables was at one meeting in Mr. Parr's office, I would not be sure, I think he was there. Cowert and Kirkpatrick were the ones that did most of the negotiating.

Q. Did you go to the Institute during the time that you were waiting for the sheep?

A. Yes, sir.

221 Q. The contract did not provide that you should get your sheep back in case of dissatisfaction?

A. They said they were willing to cancel the contract to get the sheep back.

Q. And you were willing?

A. If they would get the sheep back.

Q. So you were willing to waive your contract?

A. I was if they would get the sheep back.

Q. Well I understand that your patience wore out and you finally, on the advise of a lawyer, you started again for Tasmania?

A. I finally started again for Tasmania. I don't know whether I was advised to do so or not, I don't know. Mr. Parr advised me that it was the best thing I could do, yes.

Q. He advised you did he?

A. Yes, sir.

Q. Did you advise with him before going?

A. I did.

Q. What did you advise?

A. Well I told him if I became dissatisfied—I wanted him to keep me informed as to what the Hagey people in Auckland were doing, I didn't know whether they were likely to leave and clear out so that I could not find them, so that if I became dissatisfied with the business in Tasmania I might know where to find them, and I told him if I became dissatisfied I would cable him at once to that effect and that he was to act, conserve my interests as he thought best.

Q. What cable were you to send him?

A. I think I told him I would cable him the word dissatisfied if I were dissatisfied.

Q. So you left Auckland with the understanding with your attorney that if he got the word dissatisfied in a cable he should do what?

222 A. He should protect my interests as rapidly as possible by notifying all the people as my agent that I was dissatisfied but by making a claim for the stock of 2000 Pounds market value and by enforcing it by legal proceedings if necessary.

Q. Did he protect your interests?

A. As far as he could. They had all gone by the time I became dissatisfied, they had all left.

Q. Was not that his business to look out and see if they got out or not?

A. I think he did advise me that they were leaving.

Q. When?

A. At the time before I had been in Hobart for the full month of February.

Q. Before you had been there for a full month?

A. Yes, sir, before I had been there until the end of February.

Q. Did he cable you?

A. Beg pardon?

Q. Did he cable you?
A. I think he wrote me a letter.
Q. What did he say?
A. Stating that they were leaving, something of that kind, I forget exactly the details of it, I know I was told before I got back.
Q. Did you immediately cable him at first?
A. I did at the end of February, when I was leaving Hobart I cabled him that I was dissatisfied.
Q. With reference to the receipt from him of this letter, when did you cable him the word "dissatisfied"?
A. At the end of February, when I commenced the dissatisfaction. O'Brien——
Q. Please answer the question?
A. I think I cabled him the morning I left Hobart, that is my recollection.
223 Q. With reference to the receipt from him of this letter when did you cable him?
A. I don't remember exactly when I received that letter, it was about the 10th February some time, I did not cable to him until several days afterwards.
Q. Several days after you heard from him?
A. Yes.
Q. I believe you said you turned this fund over to Mr. O'Brien on February 11th?
A. To Gilmore.
Q. What did you turn it over for?
A. Because he said he was treasurer and wanted to get at the truth of the——
Q. I thought you said you were treasurer, you testified that you were treasurer of the business?
A. I testified and wish to have it appear that way, the agreement is that Gilmore was to be secretary and treasurer.
Q. You had the fund at the start?
A. I had the fund because I was the first to start out, to start the business.
Q. Had you when you left the second time for Tasmania any better opinion of the Hagey gold cure business than you had when you got those instructions?
A. Well, I don't know that I had any bet-er opinion of the business. I don't think that my opinion had been improved very much.
Q. Nothing had transpired during the two months and a half in Auckland to improve the bad opinion which you had of this humbug?
A. No there was nothing that transpired to make me satisfied with my contract.
Q. In fact you were still dissatisfied with it when you left?
A. Never during the whole time after I received those instructions did the business appear satisfactory to me.
224 Q. Well please answer the question. You were dissatisfied with it when you left?
A. The business did not seem satisfactory to me.

Q. Were you dissatisfied with it when you left the second time?
A. The business did not seem satisfactory to me.
Q. Will you please answer the question, yes or no, were you dissatisfied with the business when you left the second time?
A. Well, all I can say is, that the business was—I did not consider it satisfactory, I suppose that means I was dissatisfied.
Q. That is not the way you intend us to——
A. Yes, I did not consider the business satisfactory.
Q. That is the way you intend us to understand it that you were not satisfied with the business when you left the second time?
A. Well, as I say I did not consider the business satisfactory, I was dissatisfied, yes.
Q. Did you ever give these medicines—did you ever have—Did you ever attempt to make a contract for the treatment of alcoholism after you left Hobart?
A. I tried to get several people, yes.
Q. Tried to get people to go into this contract which you knew was a fraudulent one?
A. I did not consider it fraudulent.
Q. You knew it was a humbug?
A. I wanted to try and see whether we could cure them as the Hagey people represented, I doubted its efficacy, I didn't think there was anything wrong about it.
Q. You knew that in the practice of it *if* you had to de-
225 ceive the patients, don't you?
A. Yes, sir.
Q. And did you attempt to make contracts of that nature?
A. I would have made contracts and treated them in that way, yes.
Q. It went against you, did it?
A. Well, I didn't have any conscientious scruples on that score. I think if it cured them up properly it would do them more good than harm, they would get their money's worth. I didn't seem to have a fixed opinion in the matter.
Q. You called it a dishonest contract?
A. I suppose I was afraid it was before I tried it, I had come to that conclusion that it was dishonest, but I don't think it—I didn't know enough about it.
Q. Well you tried it after you went back to Auckland, did you not?
A. I didn't try it on a sufficient number of people to form an opinion as to the value of the cure.
Q. Yet two months after that didn't you go into the Hagey institute and demonstrate it there?
A. I had not treated patients myself. From having watched the results of the cure I don't think I was capable of passing an opinion as to whether the cure was worth the price that the patient would be able to pay for it.
Q. Did you make any effort during the two months and a half to find out whether you were wrong in that opinion?

A. Yes, sir, I knew several patients that had relapsed during the two months and a half.

Q. So the efforts that you did make only convinced you the more firmly that it was a humbug?

A. Yes, sir.

Q. But still you entered upon this business in Hobart in that frame of mind?

A. I entered into the business and tried to find out if I
226 could make it satisfactory and I tried all I could to make it satisfactory.

Q. Do you know when, Mr. Harrison, that it was unsuccessful?

A. I don't know when the business was unsuccessful.

Q. You do not?

A. When I got the instructions I felt sure it would be successful, at least, I expected it would be.

Q. And you lay low——

A. I did my utmost to make it successful. I was conscientiously determined to make it successful if it could possibly be made so.

Q. You have stated that when this fund was decided upon the members warned you that they would not pay any more money in, is that true?

A. Yes, sir, that is so.

Q. What was the argument they used in connection with the sufficiency of that amount?

A. They said it was enough and if I could not get started on that I would not get started at all, something to that effect; anyway they were not going to put up any more money and I had to make it go and if I knew that I would probably make better use of the money than if I relied upon getting more.

Q. Who was Mr. Gilmore, was he a side partner of yours?

A. He was—I found him suitable as a partner under the contract, yes.

Q. A friend of yours, was he?

A. I was very well acquainted with him.

Q. Did you advise Gilmore while you were there, two months and a half in Auckland that you were trying to get your sheep back?

227 A. He knew that I was trying to get out of the deal, I had told him.

Q. And he was down there then?

A. He had gone on, yes.

Q. What was he waiting for?

A. Until I would come down or get out of it and they would send somebody else in my place.

Q. He was willing to give the thing a trial?

A. Yes, sir. He went down because I promised to pay him a month's salary if he went. I told him that I had that much funds of my own in my hands.

Q. Will you please produce the demand for stock of the market value of 2000 Pounds in some other territory of the Company's field

of operation, which you say was put in writing, or a copy of it, if you can?

A. That letter that I sent to Kirkpatrick was the demand for stock.

Q. We are not talking about your letter, we are talking about the demand that you say was in writing?

A. That is the only demand that I remember making in writing except a writ in the New Zealand suit.

Q. Then you were mistaken, were you?

A. That letter I considered a demand.

Q. You didn't put any demand in writing?

A. I considered I made a demand when I wrote that letter. I said my demand was for 2000 Pounds or stock of the market value of 2000 Pounds.

Q. What is that?

A. I said in that letter that my demand was for stock of the market value of 2000 Pounds.

Q. This is your demand in writing?

228 A. That is the demand that I sent to Kirkpatrick, I made a verbal one before that and that is the written one.

Q. You said it was written, a demand for 2000 Pounds of stock in any other of the Company's field of operation.

A. Mr. Parr was making demands for me.

Q. What is that?

A. Mr. Parr afterward wrote letters making demands for me, before he brought the suit in New Zealand.

Q. Where are they?

A. I have not copies of them here.

Q. What is the name of the doctor you employed in Hobart?

A. I forget his name now.

Q. Did you ever remember?

A. Not since I have come to this country. I only saw him once or twice and made a bargain with him, but if I saw a list of Hobart physicians I might pick him out, but I forget the name now.

Q. What was your bargain?

A. He was to get a certain percentage of what we collected from each patient.

Q. What was it?

A. I am not sure, I think it was about 10 per cent., something of that kind, 2 Guineas out of 20 Guineas, or 25 Guineas, we were to charge for it.

Q. Was he a reputable man?

A. There was nothing against his reputation that I could hear, he was considered a good doctor there, considered a man who was a good physician.

Q. Did he know of the deceit you practiced on the patient or were to practice?

A. That matter was not discussed. He undertook to examine the patients and tell whether they were fit for treatment or not,

229 supervise the treatment.

Q. What kind of treatment?

A. The Hagey treatment.

Q. Did he know what the Hagey treatment was?
A. We told him that it was like the Keeley treatment, and he seemed to know all about it.
Q. You told him it was like the Keeley treatment?
A. Yes, sir, he seemed to know all about it, didn't want any further information.
Q. You were passing Cowert's statement along, were you?
A. Yes, sir.
Q. You didn't expect when you signed this contract to know the formula yourself, did you?
A. No.
Q. You had seen the articles of copartnership of the Hagey—African Pacific and Indian Hagey Company, had you not?
A. Yes, sir.
Q. And you saw by them that none of the partners knew the formula?
A. Yes, sir.
Q. And you saw also by the articles of copartnership of the African Pacific and Indian Hagey Co. the restrictions that were placed upon the partners, did you not?
A. Yes, sir, that they had all to consent in writing to the formula being revealed.
Q. Did you return any of the salary that you took out of this fund?
A. No.
Q. Did you ever offer to return any of it?
A. No. And I think I earned it, I was there for a month.
Q. You say you know something about the New South Wales transaction, is that true?
A. Yes, sir.
Q. Did you know that they bought a building in Auck-
230 land with the proceeds of the New South Wales sale?
A. No, I didn't know that.
Q. They didn't tell you?
A. No, the money for the building that was bought in Auckland was raised in another county, I think, as far as I know, so far as I know it was raised among New Zealand people.
Q. You have said that when you returned to—that you met Cowert, Kirkpatrick and Wolvington, I believe, at Sidney?
A. Yes, sir.
Q. You stated that they had heard of your dissatisfaction what did you mean by that?
A. They called on me and wanted to know what was the matter, they heard that I was in town and left Hobart and wanted to know what was wrong.
Q. You don't think that they said that they had heard of your dissatisfaction?
A. I think they said O'Brien had communicated with them about my leaving dissatisfied.
Q. Then you told O'Brien that you were dissatisfied?
A. Certainly I did.
Q. When did you tell him that?

A. When I was leaving, when I handed the business over to him.
Q. You didn't tell him that you were dissatisfied when you got there, had you?
A. No.
Q. Did you tell any of the Hagey people in Auckland that you were dissatisfied before you left?
A. They knew that I wanted to get out of the bargain if I could.
Q. Please answer the question?
A. They knew that I wanted to be relieved and that I didn't consider the business that I would like to get out of my contract.
231 Q. Did you tell any of the Hagey people in Auckland before you left that you were dissatisfied?
A. I don't know whether I told them in those particular terms or not. They knew that I didn't want to continue the contract if I could get out of it.
Q. They knew when you left that you were already dissatisfied?
A. They knew that I wanted to get the sheep back or the money and get out of the contract.
Q. Did they know that you were already dissatisfied?
A. I told them that I wanted to be relieved of the contract, they knew that.
Q. You didn't tell them that you were dissatisfied?
A. I don't remember.
Q. Did you not know at the tme that you left Auckland that Cowert and Kirkpatrick—I mean the first time you left Auckland for Sidney that Cowert and Kirkpatrick were unfriendly to Mr. Ables?
A. They told me that there had been some friction among them, but I didn't know the details of it, they seemed to be friendly enough, I knew there was some business friction.
Q. And yet you dealt with these two gentlemen, and you dealt with them principally?
A. I also saw Mr. Ables and he told me what they had done.
Q. Answer the question?
A. Yes, sir.
Q. At the same time you knew there was some friction between them?
A. I also went to Mr. Ables to find out if he was satisfied with what they had done and he seemed to be for that reason.
Q. Did you know why Mr. Moore didn't sign your contract?
A. He said it was enough for the others to sign.
232 Q. Said it was enough?
A. Yes, sir.
Q. And you as a lawyer thought so, did you not?
A. Well he refused to sign.
Q. Answer the question?

Objected to.
Objection sustained.

Mr. McClanahan:

Q. Did you see Moore refuse to sign?

A. He said it was enough when I asked him to sign, he said it was enough for the others to sign, he would not.

Q. You also said that he said it was enough for the others to sign?

A. Yes.

Q. You were entering into a contract with the partnership were you not?

A. Yes.

Q. Is it not a fact that you were in Hobart for a whole month and did not get a patient?

A. Yes.

Q. Is Hobart a temperance town?

A. Not particularly so that I know of.

Q. Did anybody want to be cured of drunkenness?

A. We heard of several people, we could not get them to come.

Q. Why not?

A. I have offered to give testimony on that score, you have objected to it.

Q. Well we will take it now. Why not?

A. Well we were told that O'Brien was keeping them back.

Q. Who is we?

A. Gilmore and I.

Q. Keeping who back?

A. The patients back.

Q. What patients?.

A. Several people we had heard of. We were told when we
233 went to their relatives to get them they said well some man told them, he cannot treat them, better that they wait until Kirkpatrick comes down. I went to O'Brien about that and said are you keeping these patients back until Kirkpatrick comes down? Well, he said, if Kirkpatrick comes we will be able to treat them better then, I said, don't you know that the funds are running out. And he said, you people can go out and I will have the whole thing for myself. I said, we want to get started, when is Kirkpatrick coming? And he said, he might come any day, but I had no information of Kirkpatrick coming there.

Q. Who was manager?

A. I was.

Q. You were the manager?

A. I could not——

Q. What did you do in the way of your duties?

A. I went to see these people, I said I want to have the patients come at once.

Q. Please name these people?

A. I don't remember their names, there were several patients, prospective patients that we had, and when they didn't come up O'Brien was sent after them first of all, and when O'Brien didn't bring them in, I went to see their friends who told me, at least in two or three cases, that O'Brien had advised them to wait until Kirkpatrick came, and I said we are ready to treat them and want them to come at once and they didn't come and I couldn't get them to come.

Q. Who are all these people that you are referring to?
A. The friends of patients that we were trying to get.
Q. You didn't go to the patients?
A. I didn't think I approached the patients personally, because O'Brien said if we would go to them and saying one thing
234 today and another tomorrow we would lose them probably altogether.
Q. The patients?
A. The negotiations were carried on chiefly with the funds of the patients, we tried to get them interested through the influence of their friends, we tried to get their friends to go to them to go and try and then after one of them had taken the treatment, the one that had taken the treatment would sympathize with the other patients.
Q. You and Gilmore for a month tried to get patients?
A. That was out business, we were very anxious to get patients.
Q. Did you do any independent work aside from O'Brien, in any way, getting patients?
A. Yes, I went to see several of the friends, I think I went to interview two friends of those who were prospective patients and they said they would not come just now, and I informed the friends of 8 or 10 others, but we were not able to get them. I went to the Mayor and Council of the town and asked for their sympathy and support which most of them promised, I went around to all the leading business people, I went around to all of the active temperance workers to get their assistance, for they approach all classes of people, wherever we thought we could get assistance from——
Q. What did the temperance people say?
A. They said they would help us in any way they could to give us information about people, prospective patients.
Q. What did you attribute the failure of the business in Hobart to?
A. Well, I don't think that when—well there was not funds enough to get it going properly and I don't think we could
235 possibly have got enough patients to make it a paying concern in any event.
Q. What do you attribute the failure to?
A. To the same reason that it has failed everywhere else, because the thing is no good.
Q. If it is no good, it wouldn't have made any difference how much money you had?
A. I don't think it could ever be made a paying proposition, I never heard of it that it has been, I never heard of anybody making money out of it excepting Cowert and Kirkpatrick, and they didn't do it by running the business.

Redirect examination of T. M. HARRISON.

Mr. ROBERTSON:

Q. Mr. Harrison, I understood you to say on cross-examination that after May of 1897 you owned the whole interest in the run, of the sheep?

A. '98, I think it was in May '98.
Q. Well at the time that you made this agreement?
A. Let me try—I made the agreement in October '98. It was the May before the date of the agreement.
Q. Well did you have the whole interest in the sheep about the time that you made this three cornered—signed this three cornered agreement with——
A. Only except——
Q. Wait until you hear the question. At the time that
236 you made this three cornered agreement on the 1st of October, '97, Ables, Robaison and yourself, did you own the whole of the sheep at that time?
A. No, I held some 500 sheep of Robaison's as security as a pledge for certain money that he owed me.
Q. Then you had not acquired the whole, the complete interest in the sheep at the previous May then, had you?
A. No. No. I——
Q. How much did you say you paid for the half interest in the run and the sheep?
A. I paid 650 also 38 Pounds, about 600—that would make 688 Pounds.
Q. And what was the value of the sheep that you added to the sheep that you put in?
A. I——

Mr. McCLANAHAN: Wait a minute. I object to the question as to the sheep.
The COURT: Objection sustained.

Mr. ROBERTSON:

Q. What did the sheep that you added to the run that you brought a half interest in cost you?

Objected to as immaterial and not cross examination.
Objection overruled. Exception.

Mr. ROBERTSON:

Q. What did those additional sheep cost you?
A. About 500 Pounds.
Q. And what did it cost you to buy out the balance—acquire the concern with Robaison's interest?

Objected to as not brought out on cross-examination.

The COURT:

Q. How much did Robaison's interest cost you?

237 Mr. ROBERTSON:

Q. What did it cost you to acquire the balance of Robaison's interest?

Objected to.
Objection overruled. Exception.

A. Altogether it cost about between 1700 and 1800 Pounds.

Mr. McClanahan: I object to that and ask that it be stricken out as irresponsive to the question.
Motion granted.

A. Let me see, 700 and 500, 1200—I suppose about between 500 and 600 Pounds.

Recross-examination of T. M. Harrison.

Mr. McClanahan:

Q. Did you pay cash for these sheep?
A. That is what I paid out in cash altogether, it was paid in cash at various times.
Q. Did you pay cash for these sheep that you added to the flock?
A. Yes, sir.
Q. Who did you buy them from?
A. I sent an agent to Robaison and bought——
Q. Who did you buy them from?
A. Robaison made the bargain.
Q. Who did you buy them from?
238 A. I think I bought them from Bieler.
Q. You don't know who he bought them from?
A. Yes, sir, he was to buy them from Birch, Bieler bought them from Birch and then we bought them from Bieler, and Bieler bought them from Birch.
Q. Didn't you take out a mortgage on the entire run when you turned these new sheep into the flock from Robaison?
A. No, they were never put in, the new sheep were never counted as partnership property, they were held as my own property when the final arrangement was made.
Q. Was not Robaison indebted to you, after you bought in he became indebted to you?
A. Yes.
Q. Why and how?

Objected to as not proper cross-examination.
Objection overruled. Exception.

A. Robaison had made me liable to pay certain debts that he had incurred in the name of the partnership, Robaison and Harrison partnership, and I undertook to pay these debts and did pay them and he assigned me the balance of his interest in the sheep.
Q. How were those debts incurred, what for?
A. Oh some of them had been run up, they were incurred in various ways.
Q. Debts incurred in connection with the sheep run were they not?
A. They were debts incurred in the name of Robaison and Harrison.

The COURT:

Q. Well, but for what purpose?

239 A. Well there were a lot of supplies brought out to the run and we paid men for services out of the partnership. Some of the service had been performed before I had been made a partner and there was some old store debts that had been incurred before I became a partner that he made me liable for as a partner, by signing for a lot of those things he made me liable for as a partner when he had no right to make me liable for as a partner, and when I found he had done this I said I will pay these things and you will have to assign me your sheep.

Q. They were all debts in connection with the run?

A. Yes, sir.

Q. What was this 38 pounds in connection with?

A. That was part of the original purchase price. I only paid 650 Pounds at first and I had not the balance to spare and I gave him my note for 38 Pounds.

Q. Gave to whom?

A. Gave to Robaison.

Q. Is not that the note that Ables assumed when he bought the sheep?

A. Yes, sir, that note was canceled.

Q. Answer the question please, did Mr. Ables assume that note when he bought the sheep?

A. No.

A JUROR:

Q. I understand Mr. Ables testified that when he signed the third contract he did not know that the words "or before" were in the contract, and you testify it was in there before the contract was signed; was it talked over with Mr. Ables?

A. Well I remember distinctly talking it over with Cowert and Kirkpatrick, and I remember when the time came for signing it the papers were lying there on the table and the Hagey partners were reading it over and they asked Mr. Robaison and I—Mr. Robaison told us that we had to leave the room while they discussed the matter. We went outside on the balcony for half an hour

240 and they called us in and the contracts were all signed. Most of them had left the room, and Robaison went out and got each of the men who had signed and brought them up to the contract and said, is that your signature, and they acknowledged their signatures to him, and then he signed as a witness.

Q. And is this copy before the court with the words "or before" a copy or original when that was signed?

A. That is one of them. There were four copies all signed, it was signed in quadruplicate.

Q. And the words "or before" were not there?

A. The words "or before" were in there, and it has been sued on in New Zealand, and Mr. Cowert had a copy as his, and they never raised this question, and they never asked Mr. Gilmore a question about the copy of the agreement that he had.

Mr. ROBERTSON: I understand that it is admitted on the part of the defendants that Mr. Magoon and Mr. Ables and Mr. McStocker as well as Mrs. Emerson, was served by Mr. Moot-Smith with a copy of this New Zealand summons on or about 23rd of July, 1898. Is that so Mr. McClanahan?

Mr. MCCLANAHAN: That is right.

Mr. ROBERTSON:

Q. What was the date that Mr. Gilmore left Auckland for Tasmania?

A. I think it was about the middle of November.

Q. Do you know the date?

A. I think it was about the 15th, I testified last time, I am not sure. It is in the transcript the last time, or he testified
241 to it, I am not sure.

Mr. ROBERTSON: Plaintiff rests your Honor.

Mr. MCCLANAHAN: If the Court please, we move for judgment of nonsuit on the following grounds: We move for a nonsuit as to the defendant Magoon on the ground that there has been shown no notice of dissatisfaction as required by the contract and no demand; on the ground that the contract is unauthorized; on the ground that there has been shown no ratification; on the ground that the evidence clearly shows that the dissatisfaction arose before the plaintiff entered into the conduct of the business and was therefore not *bona fide;* on the ground that there was no consideration for the contract sued on; on the ground that there was shown in the evidence a judgment in the New Zealand Court that remains unsatisfied and that it bars this action.

We make the same motion on the same grounds for the defendant Emerson.

We make the same motion on the same grounds for the defendant McStocker.

For the defendant Magoon we further move for a nonsuit on the following grounds viewing the contract as joint and several:

First. Because the contract is beyond the scope of the partnership business authorized;

Second. Because there has been no ratification shown within the rules of law as a ratification of an unauthorized contract;

Third. Even if ratification of some of the parties be shown, there is no ratification on the part of all and as a contract, could not be authorized by less than all, it cannot be ratified by less than all;

242 Fourth. On the ground that judgment has been had against some of the joint contractors that bars this suit against all or against the remaining ones;

Fifth. The contract was without consideration, the contract sued on;

Sixth. There is no signature of the firm to the contract sued on because all the members of the partnership did not sign.

Seventh. There is no proof of any *bona fide* dissatisfaction on the part of Harrison;

Eighth. There is no proof of any notice of any dissatisfaction to or demand on the defendant Magoon or the defendant McStocker or the defendant Emerson, or any of them;

We make the motion on the same grounds viewing the contract as joint for the defendant Emerson and the defendant McStocker. Viewing the contract as a several contract we move on behalf of defendant Magoon for a nonsuit on the ground that no authority is shown to bind Magoon, McStocker or Emerson or any of them:

Second. That no ratification has been shown by them or any of them;

Third. That no proof of any *bona fide* dissatisfaction on the part of Harrison has been shown;

Fourth. That there is no proof of notice to or demand on Magoon, McStocker or Emerson or any of them, and it is necessary to give notice and make demand on each.

Fifth. On the ground that no consideration passed to the several obligers.

243 We make the same motion on behalf of the defendant Emerson, on the same grounds and on behalf of the defendant McStocker on the same grounds.

We move for a nonsuit on behalf of defendant Ables:

First. On the ground that there is no contract by Ables without the others and no intent on either his part of Harrison's that he should be bound if the others were not;

Second. The form of the action is unsuited to the Plaintiff's claim since Ables cannot be bound severally on the contract;

Third. The contract was made by the Company and cannot bind Ables individually;

Fourth. If it be held that the contract can bind Ables individually it is a several contract, and there is no proof furnished of any notice of dissatisfaction to Ables and consequently no demand upon Ables.

Fifth. If assuming a contract to be held to be a joint one on the part of Ables and certain of the other defendants, the New Zealand — bars this action against Ables;

Sixth. There is no proof of any *bona fide* dissatisfaction on the part of Harrison;

Seventh: There is a misjoinder of parties defendant;

Eighth. There is no consideration passing to Ables;

Ninth: The New Zealand judgment bars this action against Ables.

The defendants' motion for a nonsuit, after due consideration by the Court, is granted as to all the defendants joining in the motion for a nonsuit, as to the defendants Magoon, McStocker, Emerson and Ables.

244 Mr. ROBERTSON: I note an exception if your Honor please.

The COURT: Gentlemen, at this stage of the case, the Court, having determined that the plaintiff cannot maintain this action as against the defendants, who have been served or who have appeared in this action, and who are now represented in Court, there is nothing in this case to be left to the determination of the jury. You are

therefore discharged with the thanks of this Court for your service in this cause.

Mr. ROBERTSON: We note an exception to the discharge of the jury.

The foregoing is a full true and correct transcript of my shorthand notes.

(Sg.) J. W. JONES,
Stenographer, Circuit Court, 1st Circuit.

Delivered this 25th day of July 1904.

245 In the Circuit Court of the First Circuit, Hawaiian Islands.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON, Defendants.

Assumpsit.

To the above named Circuit Court of the First Circuit, Hawaiian Islands, Greeting:

I Frank Wilson Smith of Auckland New Zealand whose name and seal are hereunto subscribed being the Commissioner named in the Commission to take Testimony hereunto annexed do certify as follows:—

1. That I did on Friday the fourth day of May 1900 at my office in Auckland aforesaid being the day and place appointed by me for that purpose diligently examine Alfred Edward Gilmore of Auckland New Zealand upon the interrogatories hereunto annexed having first administered an oath to the said Alfred Edward Gilmore and did reduce the examination of the said Alfred Edward Gilmore to writing which said writing is hereunto annexed and is signed by the said Alfred Edward Gilmore.

In testimony whereof I have hereunto set my ha-d and seal at Auckland aforesaid the sixth day of July one thousand nine hundred.

(Sg.) F. WILSON SMITH, [SEAL.]
Commissioner.

246 *Interrogatories for Alfred Edward Gilmore, City of Auckland, Colony of New Zealand, Agent.*

1. Did you sign the Contract, a copy of which is produced marked "A"?
2. If so when?
3. How many copies were signed?
4. When did the other parties to the Contract sign?
5. Who is the witness to the contract?
6. Where is he?
7. From whose custody were the signed copies produced?
8. When did you go to Tasmania?

9. Did you go at your partner's, Mr. T. M. Harrison's request?
10. Where did you locate in Tasmania?
11. What did you do in the Hagey business before the other persons to assist you arrived?
12. When did Mr. O'Brien arrive?
13. When did Mr. Harrison arrive?
14. Was the intended opening of the Hagey Gold Cure business well known in Hobart before O'Brien and Harrison arrived?
15. Did you know of any prospective patients at this time?
16. Did you hear of any more prospective patients between this time and the time of your departure from Tasmania?
17. What did you do concerning the opening of the Hagey business after Harrison's arrival?
18. What did Harrison do after he arrived?
19. What was O'Brien expected to do, and what did he do?
20. What was done in order to obtain premises?
21. What was done to advertise the business?
22. When were the premises engaged and when were they
247 ready to receive patients?
23. Was there anything in the condition of the premises or in the repairs being made to them that would render them untenable for treatment of patients?
24. If so what were those things?
25. During what time did they exist?
26. How long would it have taken to remedy them if patients had come for treatment?
27. Was it necessary for men working on the balcony and verandah to enter the house?
28. Did workmen create an annoyance by making noise?
29. If so when and for how long?
30. Did men painting the verandah and balcony in any way disturb the people in the house?
31. Were the premises suitable to receive patients during the time you, O'Brien and Harrison were in Hobart?
32. Do you know if O'Brien was keeping patients from coming to premises for treatment?
33. If so when did you learn this?
34. What reasons had you for so believing?
35. Did you mention the matter to Harrison?
36. If so when?
37. What did you tell him?
38. Did you become dissatisfied with the condition of the business?
39. If so why?
40. When did you leave Hobart and Tasmania?
41. What was the financial condition of the business when you left?
42. In this statement marked "B" so far as you remember a true statement of receipts and expenditures up to the dates mentioned in it?
43. Whom did you leave in charge of the business?

248 44. With the funds on hand could Mr. Harrison have continued the business for more than a few days after you left?
45. How were the funds for starting the business raised?
46. Were the other partners and yourself willing to advance more funds for continuing the business?
47. Did you hear any of the o-her partners express their intentions in regard to this matter?
48. If so whom?
49. What did they say?
50. Was there a better opportunity of obtaining patients after you left than there was before?
51. If so why?
52. What settlement did you make with the defendants in this action concerning your interest in the Tasmania business?
53. What efforts did you make to recover from these defendants the Two Hundred and Fifty (250) pounds invested by you in this business?
54. How far have your efforts been successful?
55. Did Mr. Harrison wish to start the business in Tasmania?
56. Did he make proper efforts to start it there?
57. Was Mr. Harrison dissatisfied with the condition of the partnership busines in Tasmania when you left there?
58. Did he have cause for being dissatisfied?
59. If so, what cause or causes?

249 In the Circuit Court of the First Circuit, Hawaiian Islands.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES and DOROTHEA EMERSON, Defendants.

Assumpsit.

Examination upon oath of Alfred Edward Gilmore, City of Auckland, Colony of New Zealand, Agent, upon the interrogatories and cross-interrogatories hereto annexed, made by Frank Wilson Smith, on Friday, the fourth day of May, 1900, in his office, in the said City of Auckland, being the day and place appointed by him.

Answer to Interrogatory Number	1. Yes.
Ditto	2. On the 1st October 1897.
Ditto	3. Three I believe
Ditto	4. I can't be positive
Ditto	5. W. C. Robison
Ditto	6. Cannot say
Ditto	7. Cannot say
Ditto	8. Think on 15th November 1897
Ditto	9. Yes
Ditto	10. Hobart

Ditto 11. Put an advertisement in the Hobart paper. That is all I did

Ditto 12. Say about six weeks after I did.

Ditto 13. A few days later than O'Brien

Ditto 14. The intended opening could only be known through the advertisement in the papers.

250

Answer to Interrogatory Number 15. No, not at the time O'Brien & Harrison arrived.

Ditto 16. Yes.

Ditto 17. Took premises. Advertised and canvassed.

Ditto 18. Acted as manager

Ditto 19. O'Brien was supposed to canvas- and I suppose he did

Ditto 20. We looked for a likely place

Ditto 21. Advertised in paper and distributed handbills.

Ditto 22. Cannot say

Ditto 23. No, but it might render it a little inconvenient for the treatment of patients

Ditto 24. Workmen being about.

Ditto 25. About a week

Ditto 26. It would not be impossible to treat patients at any time. It might have been inconvenient but was quite practicable

Ditto 27. Cannot say.

Ditto 28. Yes, a slight one

Ditto 29. During the alterations

Ditto 30. Not as much as painters would ordinarily disturb the people in the house.

Ditto 31. Yes

Ditto 32. I do not know, but had a suspicion

251 Ditto 33. ——.

Ditto 34. Because he never brought any patients

Ditto 35. Yes.

Ditto 36. On several occasions.

Ditto 37. That I was dissatisfied with O'Brien's canvassing.

Ditto	38. Yes.
Ditto	39. Because there appeared no prospect of doing business and we could not get any patients.
Ditto	40. About the end of March, 1898.
Ditto	41. Bad.
Ditto	42. As nearly as I can remember.
Ditto	43. O'Brien.
Ditto	44. No
Ditto	45. On terms of our agreement.
Ditto	46. No.
Ditto	47. I believe I did
Ditto	48. Cowart or Kirkpatrick.
Ditto	49. The gist of what they said was that they did not care to advance any more money.
Ditto	50. I cannot say
Ditto	51. ——.
Ditto	52. I got two Promissory Notes from Cowart for the amount I had invested (£250) but they were dishonored.
Ditto	53. I sued in Scotland on the Promissory Notes.
Ditto	54. I recovered the amount without costs.
Ditto	55. Yes.
Ditto	56. Yes, I suppose so, he did his best.
Ditto	57. Yes.
Ditto	58. Yes.
Ditto	59. I presume for the same reasons as I was dissatisfied myself as mentioned in my answer to interrogatory No. 39.

(Sg.) A. E. GILMORE.

(Sg.) F. WILSON SMITH.

252 [N. Z. Stamp 11 1/10/97 T. M. H.]

"A."

Memorandum of Agreement.

Memorandum of Agreement made this 20th day of September, 1897, between the African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members:—T. E. Cowert, J. H. Kirkpatrick, and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore, and Thomas Milner Harrison, both of the City of Auckland in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now These Presents Witnesseth:

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own
253 (11/20) eleven-twentieths, in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; and the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby *g*formed otherwise than as partners therein; and they thereby convey to the said partnership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine-twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of

(£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some
254 other district of the Company's field of operation in exchange for the portion of the said (£2250) two thousand two hundred and fifty pounds taken by him, and the said Company reserve- the right either at the suggestion of the partners in Tasmania, or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two-fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one-twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one-twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWERT.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWERT.
A. E. POWTER,
By His Att'y, T. E. COWERT.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of

255 B.

Statement of Funds of Hagey Company, Tasmania, Received and Disbursed to Feb. 11, 1898.

Receipts.

Oct. 12.	From Hagey Co. Auckland	110″	0″	0″
"	T. M. Harrison	80″	0″	0″
		190″	0″	0″

Disbursements.

Oct. 12.	Medicines	24″	0″	0″
	Exchange		8″	7″
18.	Freight on Med.	30″	10″	0″
Nov. 9.	A. E. Gilmore	30″	0″	0″
Jan. 10.	J. D. O'Brien	20″	0″	0″
" 24.	J. D. O'Brien, passage	6″	5″	0″
Feb. 3.	Hyp. Syringe		15″	0″
" 4.	Adv. Tasmanian News	2″	0″	0″
" 5.	Adv. Mercury	7″	0″	0″
" 5.	J. D. O'Brien	10″	0″	0″
" 7.	Moir Hyp. Syringe	1″	15″	0″
" 7.	Gilmore, Med. & Adv.	1″	15″	0″
" 9.	Rent	7″	0″	0″
" 11.	Gilmore, duty Med.	3″	0″	1″
" 11.	Stationery		5″	11″
" 11.	T. M. Harrison	40″	0″	0″
" 11.	Balance on hand	34″	16″	0″
		190″	0″	0″

256 PLAINTIFF'S EXHIBIT "A."

(Endorsed.)

Filed 29th October, 1903. M. T. Simonton, Clerk.

This agreement made between T. E. Cowart, J. H. Kirkpatrick and Geo. D. Moore of San Antonio, Texas, and A. E. Powter, of Montreal, Canada, and J. A. Magoon, F. B. McStocker, L. C. Ables, and Dorothea Lamb, of Honolulu, Island of Oahu: Witnesseth,

That the said parties agree and do hereby associate themselves together as partners in the business of administering the formulas known as the Hagey Gold Cure, and in the establishment and disposition of Institutes for the purpose of administering said formulas.

The territory through which the operations of this Company will extend are the Islands of the Pacific and Indian Oceans, and the

Continent of Africa, exclusive of the Hawaiian Islands; the right to the same having been acquired by transfers from F. A. & W. C. Sutphen, of Aurora, Illinois, copies of the bills of sales of which are hereto attached and made a part hereof, and which rights are hereby transferred to and vested in this Company.

The capital stock of this co-partnership shall consist of One Hundred and five thousand (105,000) dollars to be owned in the following proportions: T. E. Cowart 31740 dollars, J. H. Kirkpatrick 31740 dollars, A. E. Powter 11458 dollars, Geo. D. Moore 2062 dollars, J. A. Magoon 12500 dollars, F. B. McStocker 5000 dollars, L. C. Ables 8000 dollars, Dorothea Lamb 2500 dollars.

The term of this co-partnership shall begin this day and continue for a period of five years.

That T. E. Cowart, J. H. Kirkpatrick and L. C. Ables shall at all times during the continuance of this partnership give their attendance and to the best of their skill and power exert themselves for the joint interest, profit and benefit of the partnership, and for such services they shall receive a salary of two hundred (200) dollars per month for each and every month as long as the said business is profitable, to be paid out of the proceeds of the business after the running expenses have been deducted. It is understood
257 and agreed that there shall be no personal liability of any of the partners for the payment of these salaries.

That all net profits shall be divided between the partners in proportion to the amount of capital stock of each and that said co-partners shall bear and sustain all expenses and losses in accordance with the proportional share that each may hold.

That at all times during the continuance of this partnership there shall be kept full and correct books of account wherein each of the said partners shall enter all money received, paid out, or expended in and about the said business, and all other matters and things whatsoever to the said business or management thereof in anywise belonging, which said books shall be open to the inspection of all the other co-partners, and the said partners once in each and every month, or oftener if necessary, shall make and render each to the others a full and correct inventory and account of all profits or increase by them or any of them made, and the losses by them or any of them sustained, and also all payments, receipts, disbursements, or other things by them made, received, disbursed, acted or done, or suffered in the said partnership and business and upon the rendering of such account shall clear, adjust, make and deliver each to the others their just share of the profits in the manner aforesaid.

That the said partners mutually agree to and with each other that during the continuance of the said partnership, none of them will give or endorse any note, or create any liability in behalf of the Company.

It is hereby expressly agreed and understood by the parties to this agreement that a fund necessary for the establishment and maintenance of the Institutes in the territory before referred to, shall be placed in the hands of the said T. E. Cowart, J. H. Kirkpatrick, and

L. C. Ables, and that the members of this Company are not bound for any debts and obligations incurred otherwise.

258 And at the end of their partnership the said partners will make each to the other full and correct account of all things relating to their business and in all things truly adjust the same, and all and every stock and stocks as well as the gains and increases hereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided between them in the aforesaid proportions.

The officers of the said company shall consist of the manager, secretary, treasurer, and auditor, who shall be selected by the members of the company, and T. E. Cowart has been selected to fill the position of manager, L. C. Ables secretary and treasurer, and J. H. Kirkpatrick, auditor, and they shall hold office subject to the will of the Company until such time as their successors are selected.

The name of the Company shall be "The African, Pacific and Indian Hagey Company."

The interest of the partners is to be pooled, that is, no one partner can dispose of his interest or any part thereof without the consent of all the other partners thereto obtained in writing.

It is hereby expressly understood and agreed that no partner shall under any circumstances whatever reveal the ingredients of the said formulas or any part thereof to any person or persons under any conditions or circumstances whatsoever unless with the consent in writing of all the other partners first obtained.

In witness whereof, we have hereunto set our hands this 10th day of April, A. D. 1897.

(Sgn.)	LEMUEL C. ABLES.
(Sgn.)	ALFRED MAGOON.
(Sgn.)	DOROTHEA LAMB.
(Sgn.)	F. B. McSTOCKER.
(Sgn.)	J. H. KIRKPATRICK.
(Sgn.)	T. E. COWART.

259 PLAINTIFF'S EXHIBIT "B."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

Know all men by these presents, that I, F. B. McStocker, of Honolulu, Island of Oahu, Hawaiian Islands, do hereby make, constitute and appoint L. C. Ables, my true and lawful attorney in my name, place and stead, to act for me in all matters connected with the African, Pacific and Indian Hagey Company, and for that purpose to establish Institutes and to sell the medicines compounded under the formulas belonging to the Company; to sell and dispose of the said formulas in the districts where he may be operating; and to do and perform all other acts and things that may be necessary and proper in the prosecuting of the business of the said Company.

Giving and granting to my said attorney full power and legal authority to do all things in the said premises as fully to all intents and purposes as I might or could do if personally present.

Hereby ratifying and confirming all my said attorney shall do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand this 10th day of April, A. D. 1897.

——— ———.

This day personally appeared before me F. B. McStocker, to me well known, who did solemnly and sincerely declare and state that he had signed the foregoing document freely and voluntarily and for the uses and purposes therein set forth. In witness whereof I hereunto affix my signature and seal of office at the British Vice-Consulate, Honolulu, this 10th day of April, 1897.

(Sig.) THOMAS RAIN WALKER,
[SEAL.] *British Vice-Consul.*

260 PLAINTIFF'S EXHIBIT "C."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

[N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of Agreement, made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association, of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members: T. E. Cowert, J. H. Kirkpatrick and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore, and Thomas Milner Harrison both of the city of Auckland, in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now these presents witnesseth:

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own
261 (11/20) eleven twentieths in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed: and the said Company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners herein; and they hereby convey to the said partnership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said company for the other (9/20) nine twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said Partnership in Tasmania each at a salary of (£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania, the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some other district of the Company's field of operation in exchange for the portion of the said (£2250) two thousanad two hundred and fifty pounds taken by him and the said Company reserve the right either at the
262 suggestion of the partners in Tasmania or at their suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) t-o fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for

which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) and (4) hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
A. E. POWTER,
By His Att'y, T. E. COWART.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

263 PLAINTIFF'S EXHIBIT "D."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 2, 1897.

DEAR MAC: At the last moment Col. Moore has decided to go to Honolulu and Texas. He will put things to you as they are.

In Haste,
(Sg.) L. C. ABLES.

Memorandum.

AUCKLAND, N. Z., *Sept.* 30, 1897.

a/c due and not collected £407–12–0.

Since Aug. 31 Expense a/c has been charged with salaries of Cowart, Kirkpatrick, Wolfenden & Ables and these parties credited with salaries due them to Sept. 30.

Daniels' salary. I have not yet credited up to him the £84-0-0 is what he has drawn on a/c. The £250-0-0 is payment received on

a/c of sale of Tasmania. £100-0-0, of this is to be put into the funds towards defraying expenses of parties going there. The sale of Tasmania was for 9/20 of the Territory we get this amount of money and about 6000 sheep which are about 270 miles from Auckland and of uncertain value.

Outstanding a/c's owed by us about £50.

E. & O. E.

(Sg.) L. C. ABLES, *Treasurer.*

Sept. 30, 1897.

264 PLAINTIFF'S EXHIBIT "E."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 29, 1897.

DEAR MAC: Yours of Sept. 22 to hand and contents all carefully noted. Regarding affairs here, I am not going to try and enter into details tonight, I have been in bed all day and it is now eleven o'clock and I have just closed the show for the night. Regarding the matter of $22000 you speak of, we did try that plan and I have tried dozens of other schemes and plans to get out. But in all of them have never lost sight of the fact that your interest must be looked after with as much if not more care than my own. I can't help thinking that it is very fortunate for you, Magoon and others that I have been here. I am perfectly satisfied however, that in trying to do what I considered square and for the best interests of all, I have got myself badly disliked with the parties here, and I feel confident the same has not been appreciated by you at home and particularly do I feel that this is so in the case of Magoon. Of course, I don't know what they write from this end neither do I know what Magoon writes. T. E. C. has given me the information that he J. A. M. took no stock in me and wanted me put out as Treasurer. I took this with a reasonable amount of salt. Regarding the deals made, they are rather to- complicated for me to explain. I will admit that I don't understand them well enough myself to explain them to any one. So I will leave that to C. & K. to give to J. A. M. I believe that Magoon & Miss Lamb will be considered more carefully than you & I. Cowart tells me that he is submitting a plan to buy them out. I, of course, don't know what the plan is. I have thought Mac many times, that you might come out better were you to let them handle your interest. If you should think so, do not consider my feelings in the matter. There is no denying the fact, that I am the one who is in the way and that I am the one they want to down if possible. I have tried hard to get my territory by myself and to give you the chance
265 to leave yours stand where it now is or go to with me. But they won't have it. I send you a copy of journal entries made today which explain themselves. I will send trial balance for Oct. first mail. When we went in with Dr. Wolfenden the arrange-

ment was that the money brought here from Honolulu was to be refunded before any dividends were paid. Your proportion of this would be..... £24 — 7 — 5
18% Dividend declared this day would be..... £162 — 0 — 0

Total..... £186 — 7 — 5

I will send you that amount less exchange. With nothing further, I am

Yours Faithfully,

(Sg.) LEM. C. ABLES.

Stock a/c ..... £512 — 2 — 10

To Sundries:

T. E. Cowart	154 — 14 — 4
J. H. Kirkpatrick	154 — 14 — 4
A. E. Powter	56 — 1 — 4
J. A. Magoon	61 — 0 — 4
F. B. McStocker	24 — 7 — 5
L. C. Ables	39 — 2 — 4
Dorothea Lamb	12 — 1 — 6
Geo. D. Moore	10 — 1 — 3

Entry made to repay money brought from Honolulu:

Dividend £3780

To Sundries:

T. E. Cowart	£1028 — 7 — 6
J. H. Kirkpatrick	1028 — 7 — 6
A. E. Powter	371 — 4 — 4
J. A. Magoon	405 — 0 — 0
Dora. Lamb	81 — 0 — 0
J. Wolfenden	378 — 0 — 0
L. C. Ables	259 — 4 — 0
F. B. McStocker	162 — 0 — 0
Geo. D. Moore	66 — 16 — 8

18% Dividend declared this day.

266 PLAINTIFF'S EXHIBIT "F."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

Trial Balance Nov. 30, 1897.

C. B. Cash	5 — 17 — 7		
1. Stock %	21000 " "		
3. T. E. Cowart Stock %		5713 — 4 — "	
4. J. H. Kirkpatrick "		5713 — 4 — "	
5. A. E. Powter "		2062 — 6 — "	
6. George D. Moore "		371 — 6 — "	
7. J. Alfred Magoon "		2250 — " — "	
8. Lemuel C. Ables "		1440 — " — "	
9. F. B. McStocker "		900 — " — "	
10. Dora. Lamb "		450 — " — "	
11. J. Wolfenden "		2100 — " — "	
13. T. E. Cowart Private %		120 — " — "	
14. J. H. Kirkpatrick " "		120 — " — "	
16. J. Wolfenden " "		40 — " — "	
17. Lemuel C. Ables " "		63 — " — "	
25. Expense	2493 — 13 — 11		
32. Alcoholism		1251 — 0 — 6	
40. Morphine		84 — " — "	
43. Nervousness		14 — 10 — "	
44. Territory		5045 — " — "	
51. Dividend %	3780 — " — "		
53. A. W. Currie	26 — 5 — "		
" H. J. Ellis	26 — 5 — "		
" G. F. Hill	11 — 5 — "		
54. David T. Fox	21 — 5 — "		
" Robt. Reu	16 — 5 — "		
" Sir Morris O'Rake	15 — " — "		
55. Mis. Oldham	1 — 5 — "		
" George H. Campbell	11 — 5 — "		
" R. J. Bromley	29 — 5 — 0		
56. Mathew O'Brien	19 — 5 — 6		
Amts. Bro't for'd	27456 — 17 — "	27737 — 10 — 6	
56. R. A. Case	29 — 5 — 0		
" Hugh L. Kirkwood	21 — 12 — "		
57. Alex. McMurtie	13 — 19 — "		
" D. Bews	26 — 5 — "		
" Harry Meyers	21 — 5 — "		
58. Frank McKenna	26 — 5 — "		
" Frank H. Chapman	16 — 5 — "		
59. John McCafferty	26 — 5 — "		
" Joe. Memns	8 — 17 — "		

" Mis. D. Archer	16 — 5 — "	
60. Wm. T. Reardon	29 — 5 — "	
" Joseph Gilmore	21 — 5 — "	
61. Henri Le. Houx.....	21 — 5 — "	
" Geo. F. Porter.....		4 — 5 — 0
62. Ed. McKeon	1 — " — "	
" Thos. Solon	1 — " — "	
63. Dan. Conway	26 — 5 — "	
" Wm. Joughen		5 — " — "
64. House %	5 — " — "	
69. Robt. Burns		5 — " — "
" Fred Gordon		10 — 12 — 6
" Patrick Walsh		10 — " — "
71. D. Dukes	— 18 — "	
72. J. P. T. Cauldfield.....	3 — 10 — "	
	27772 — 8 — "	27772 — 8 — "

267 PLAINTIFF'S EXHIBIT "H."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

Memorandum of Agreement.

These articles of agreement entered into between the African Pacific & Indian Hagey Company, an association or partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, said co-partnership composed of the following members, to-wit:

T. E. Cowart, J. H. Kirkpatrick, and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables, and Dorothea Lamb of Honolulu, Republic of Hawaii, all parties of the first part, and J. Wolfenden, of Victoria, Australia, (formerly of Chicago, Illinois), party of the second part. Witnesseth:

For and in consideration of the convenants and agreement hereinafter named, by the party of the second part, the parties of the first part acting for themselves individually and for the partnership collectively do hereby constitute and accept said J. Wolfenden a partner in the before mentioned Company, and entitled to all the privileges, and bound by all the conditions, limitations and restrictions as set forth in the original articles of co-partnership being attached hereto and made a part hereof. Dr. Wolfenden's interest in the business does not include the continent of Africa, it being hereby reserved.

The said J. Wolfenden's interest in the partnership consists of a ten thousand five hundred (10,500) dollar interest in a capital stock of one hundred and five thousand (105,000) dollars. Said interest is hereby vested in and assigned to said J. Wolfenden in the same manner as the various interests are held by other members of the Company.

In consideration of the foregoing covenants and agreements upon the part of the parties of the first part, the party of the second part does hereby transfer, and assign to the new partnership of which he is a member, all rights, franchises, or contract rights he may have secured, or which in the future he may secure from Dr. — Thompson, of Chicago, Illinois, United States of America, to use, control, or in any wise dispose of the remedies for alcoholism and narcotism, said remedies being the original discovery of the said Dr. — Thompson, the foregoing stipulations apply to the following territory, to-wit: Australia and all other islands of the Pacific and Indian Oceans, and none other.

268

And the said Wolfenden hereby binds himself, his heirs or assigns to refrain from using or permitting others to use, or in any wise dispose of any rights, franchises, or of administering or permitting others to administer any of Dr. Thompson's remedies for alcoholism and narcotism in any of the before mentioned territory.

It is further provided that the said J. Wolfenden, or his representative, is hereby given power and authority to use Dr. Thompson's remedies in the Institute already established in Victoria, Australia, until such time as the co-partnership may determine to be for their best interest.

Said party of the second part agrees to give his entire time to the business of the co-partnership in the capacity of lecturer, and general traveling representative for the company. For such services the said J. Wolfenden shall receive the sum of two hundred (200) dollars, or (forty pounds) per month; to be paid in the same manner as the salaries of the other officers of the Company provided for in the original articles of co-partnership.

Said J. Wolfenden shall have full authority to carry on his ministerial work but in such a manner as will not conflict with his duties toward the before mentioned Company. Each Sunday and two evenings per week being entirely at his own disposal.

That the plan of establishing and operating the business shall be to establish in Auckland, New Zealand, and in such other cities as may be deemed for the best interest of the Company, Institutes, or places of treatment, where Dr. W. H. H. Hagey's remedies will be administered for alcholism and narcotism under the directions of a licensed physician. Every means will be exerted to elevate the moral nature of the patient during the time he is under treatment.

269

As soon as the proposed Institute is established in Auckland, New Zealand, and in a good condition, a branch Institute shall be established as soon as practicable in some suitable location in the Country for the reception of patients who prefer to attend such an Institute. A physician will be employed to administer the treatment, a superintendent shall have charge of the Institute, and such other arrangements shall be made for the promotion of the best interests of the Company.

It is also stipulated that Miss Agnes W. Jamieson of Victoria, Australia, shall be tendered a position as an employee of the Company on a salary of twelve pounds per month, with board. Her term of service to begin upon her return, from a proposed visit to

Victoria, Australia, to Auckland, New Zealand, and to continue as long as she may be able to discharge her duties, and the said Dr. Wolfenden remains with the co-partnership before referred to. Miss Jamieson's reasonable traveling expenses when on business for the company, shall be paid by the said company.

Said J. Wolfenden shall not be called upon to contribute any money towards the establishment of the Institute in Auckland, New Zealand, a fund already having been provided by the original co-partnership for that purpose, nor shall he be accounted for to the parties having supplied the same.

It is further agreed that when the co-partnership shall deem it to their interest to take charge of the Institute now running in Victoria, Australia, under the management of the said J. Wolfenden (and which Institute nothwithstanding anything herein contained, J. Wolfenden is authorized to run at his own cost and expense, and for his own benefit for one year), they may purchase the same and the good will and furniture therein at a valuation, paying to the said J. Wolfenden nine-tenths (9/10) of the purchase money, upon the payment of which, the said Institute, good will and fur-
270 niture shall be the property of the partnership but should the partnership not purchase the same at the expiry of such year the said J. Wolfenden may sell the same to any other person on the express condition that the Hagey remedies be exclusively used therein in which case the said J. Wolfenden shall retain for his own use nine tenths in of the purchase money paying one tenth to the other members of the partnership. During the time subsequent to the expiry of such year in which the said Institute may remain unsold the said J. Wolfenden may continue to run the same using the Hagey remedies exclusively unless otherwise agreed by the partnership he retaining nine-tenths of the profits and paying the other members of the partnership.

It is further agreed that in the event of the dissolution of this partnership, and their retirement from business, said J. Wolfenden is hereby given full power to carry on Institutes for the treatment of inebriates along the lines operated on by him before the formation of this present partnership, using Dr. — Thompson's remedies.

The status of the said J. Wolfenden in the said partnership so formed is that of one of the managing partners of the Company, co-ordinating with the other officers of the Company provided for in the original articles of co-parnership.

(Sgn.) T. E. COWART.
(Sgn.) J. H. KIRKPATRICK.
(Sgn.) A. E. POWTER,
By His Att'y, T. E. COWART.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK & T. E. COWART.
(Sgn.) J. H. KIRKPATRICK.
(Sgn.) T. E. COWART.
(Sgn.) LEMUEL C. ABLES.
(Sgn.) FRANK B. McSTOCKER,
By His Attorney in Fact L. C. ABLES.

271 PLAINTIFF'S EXHIBIT "I."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 12, 1897.

Thomas Milner Harrison, Sydney.

DEAR SIR: I enclose you herewith exchange on Bank of New Zealand for £86 less exchange leaving £85 — 11 — 5. This is the amount of our assessment of £110, less bill for medicines of £24. I have sent you a bill for £10 — 0 — 0 thinking it may be of service to you in Custom House. Entry medicines 90 forward by steamer and instructions mailed you under separate cover.

Kindly acknowledge receipt.

Yours truly,

(Sg.) D. C. ABLES, *Sec'ty.*

272 PLAINTIFF'S EXHIBIT "J."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

Know all men by these presents, that we, John Alfred Magoon and Dorothea Lamb, of Honolulu, Island of Oahu, Hawaiian Islands, do hereby make, constitute and appoint T. E. Cowart and J. H. Kirkpatrick, of San Antonio, Texas, at present residing in the said Honolulu, being about to depart for Australia, and the other Islands of the Pacific and Indian Oceans, and Africa, our true and lawful attorneys in our names, places and stead to act for us in all matters connected with the African, Pacific and Indian Hagey Company, and for that purpose to establish institutes and to sell the medicines compounded under the formulas belonging to the Company; to sell and dispose of the said formulas in the districts where they may be operating; and to do and perform all other acts and things that may be necessary and proper in the prosecution of the business of the said Company.

Giving and granting to our said attorneys full power and legal authority to do all things in the said premises as fully to all intents and purposes as we might or could do if personally present. Hereby ratifying and confirming all our said attorneys shall do or cause to be done by virtue of these presents.

In witness whereof, we have hereunto set our hands this the tenth day of April A. D. 1897.

(Sgn.) JOHN ALFRED MAGOON.

(Sgn.) DOROTHEA LAMB.

This tenth day of April A. D. 1897 personally appeared before me John Alfred Magoon and Dorothea Lamb, both to me well known, who did individually and severally, solemnly and sincerely declare and state that they had signed the foregoing document freely and voluntarily and for the uses and purposes therein set forth. In witness whereof I hereunto affix my signature and seal of office at the British vice-consulate, Honolulu, the day and year aforesaid.

(Sgn.) THOMAS RAIN WALKER,
[SEAL.] *British Vice-Consul.*

273 PLAINTIFF'S EXHIBIT "K."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 30", 1897.

Miss Dorothea Lamb, Honolulu, H. I.

DEAR MISS LAMB: Your letter dated Sept. 17", 1897, duly received in course of mail. From the letter written to Mr. Magoon by Mr. Cowart and myself I think you will find every thing explained. I am at a loss to understand how you got so mixed, or, if you say so, how we got so mixed up. We both thank you for your expressions of confidence and cheering words. You may rely upon it Miss Lamb, that we will guard your interests as closely as we would our own.

By to-day's mail you will receive £93 — 1 — 6, less exchange rate. This amount is derived from two sources, £12 — 1 — 6 being the return of the assessment levied in Honolulu, and £81 being 18% on the stock held in your name on the books of the Company. We closed a trade yesterday out of which we received £5000.

We had a deal on foot to form a Company for Sydney on the basis of £25000. £12500 of which was to be sold to a local syndicate £5000 to be paid in cash, and the other £7500 to be paid for as the one-half interest of the syndicate made it.

The project was on the verge of falling through only £3000 of the £5000 having been raised. We found two gentlemen who were willing to close up the gap and put in their £2000, thereby completing the £5000, provided we would sell them a one-half interest in the islands of the Pacific and Indian oceans (not Africa), subject to all prior sales made by us.

The consideration for the one-half interest to be the £2000 cash paid into the Sydney deal and the first £10500 received from the sale of rights in said territory. This is made a first charge on the business. The £3000 paid into the Sydney deal was to be a credit,
274 on the £10500 to be paid. When £7500 more is paid into our hands from the sale of Australasian rights then these two gentlemen have a fully paid up half interest and are entitled to share in the proceeds.

We deemed the trade a good one and have made it, and for-

warded you your part of the money. Now, Miss Lamb, if our action does not meet with your approval, and that of Mr. Magoon, and you are desirous of terminating your business relations with us, we feel that we can send you your original investment. You can use your own judgment in the matter. It is true that it is a highly speculative enterprise, but we have never had any reason to change our ideas about it. Mr. Ables will send you a statement of the business.

Mr. Magoon seems to have lost heart in the business and in us and his letter was a great disappointment to us. The letters written to Dexter were calculated to do us great harm.

Enclosed you will find drafts in favor of Mr. Magoon for the sum of £466 — 0 — 4, less exchange rate, which you will please deliver to him. £61 rebate on original assessment and £405 on stock. 18% was paid on the stock and Mr. Magoon's $12250 investment was reduced 10% the same as yours and all the rest to set over the 1/10 interest given to Dr. Wolfenden that we have written about. You will see that from Mr. Ables' statement.

We are sorry to learn that the business there has not done well. But we feel that had we been there to operate it, all would have been different.

We trust you are well, and will close by sending you our *aloha nui*.

Sincerely yours,

(Sig.) COWART & KIRKPATRICK.

275 PLAINTIFF'S EXHIBIT "I."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 7, 1897.

Judge Magoon, Honolulu, H. I.

MY DEAR MR. MAGOON: Another mail and no money to send you. I know we will take a lot of cash in before the next mail.

We sold a 1/5 interest in N. Z. for £5000 *pounds* cash. The money was put into a place and furniture that is worth the money. Buying the place has had the effect that I knew it would viz: people are running after us to get an interest in the business. We sold 1/2 interest in Tasmania last week for 8000 sheep and £500. The parties could not raise £500 after agreeing to but paid £250 and took 1/2 less £250. The sheep and lease of the land 24000 acres was valued at £2000. We hope to sell the sheep in a short time. We are offered £5000 for a 1/5 interest in New South Wales by some first class business men of this city. This is cash and they mean business if they can raise the money. They are now seeing what they can do towards raising the money.

We have been with them all the morning. We are having big socials each Friday night and they please everybody. We will likely move into the new place about the 15th.

Ables and Col. Moore have not and will not sign any papers

(Ables did sign the papers for Tasmania) They are very disagreeable but we are going ahead without their consent. They consulted a lawyer and he told them they were in a hop-less minority and the sooner they fell into line the better it would be for them. Their object has been to force us to buy them out.

Ables came to me about two weeks ago and said to me "I know you can easily raise $12000 for my interest and I wish you would
276 do it." I said but Ables we have pooled out interest and the others would not agree to it. He said if you will get a party to put in the money, I will give you or him a power of attorney to handle my interest and will *never* let *anyone* know a word about it. I told Kirk and Daniels of his offer. They have given up all hopes of blackmailing us and are now offering to do better we are paying very little attention to them. I do not tell you this as a secret, you are welcome to write Ables and tell him I wrote it to you.

I have found him to be the man Mr. Gear told me he was. It will take more than Ables and Col. Moore to keep this business from being a success. We are sure to make it come out all right.

We have been very successful in curing our patients and they are staying with us O. K.

We have secured one of the leading physicians in Auckland for 12 mos. for £750 per annum. He has the formula and is preparing it in good shape.

Kirk joins me in sending best wishes to you and Miss Lamb.

I am yours for success,

(Sg.) T. E. COWART.

277 PLAINTIFF'S EXHIBIT "M."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

No. 3608.

In the Supreme Court of New Zealand, Northern District.

Between

THOMAS MILNER HARRISON, of Auckland, in the Colony of New Zealand, Solicitor, Plaintiff,

and

T. E. COWART, J. H. KIRKPATRICK, GEORGE D. MOORE, A. E. POWTER, J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA LAMB, and JAMES WOLFENDEN, Carrying on Business Together in Co-partnership in the Islands of the Pacific Ocean under the Style or Firm of the African Pacific and Indian Hagey Company, Defendants.

Thursday, the 9th day of June, 1898.

Upon reading the affidavit of Thomas Milner Harrison sworn, and filed herein and upon hearing Mr. Christopher James Parr of Counsel for the plaintiff it is hereby ordered that leave be granted to the

plaintiff to serve with the writ of Summons herein the defendants J. H. Kirkpatrick, George D. Moore, A. E. Powter, J. A. Magoon, F. B. McStocker, L. C. Ables, Dorothea Lamb, and James Wolfenden out of the Colony of New Zealand and also that the defendants James Wolfenden, George D. Moore, and J. H. Kirkpatrick, being all resident in Australia, shall file their respective Statements of Defence at the office of this Honorable Court at the City of Auckland in New Zealand within Thirty-five days after and exclusive of the day in which such Writ shall be served upon the said James
278 Wolfenden, George D. Moore and J. H. Kirkpatrick respectively And also that the defendants J. A. Magoon, Frank B. McStocker, Dorothea Lamb and L. C. Ables, all resident at Honolulu, do file their respective Statements of Defence within Forty-two days after and exclusive of the day on which such Writ shall be served upon the said J. A. Magoon, Frank B. McStocker, Dorothea Lamb and L. C. Ables, respectively And also that the defendant A. E. Powter resident in California do file his Statement of Defence within Sixty days after and exclusive of the day in which such Writ shall be served upon him and it is further ordered that the trial of this action shall be held at the first sittings of this Honorable Court at Auckland after the expiration of the above mentioned periods for filing Defences herein.

By the Court

(Sgd.) HENRY C. BREWER,

[SEAL.] *Registrar.*

True copy.

279 In the Supreme Court of New Zealand, Northern District.

No. 3608.

Between

THOMAS MILNER HARRISON, of Auckland, in New Zealand, Solicitor, Plaintiff,

and

T. E. COWART, of Auckland aforesaid, Agent; J. H. KIRKPATRICK, of Sydney, New South Wales, Agent; GEORGE D. MOORE, of Sydney aforesaid, Agent; A. E. POWTER, of San Jose, California, U. S. of America, Hotel-keeper; J. A. MAGOON, of Honolulu, in the Republic of Hawaii, Counsellor at Law; FRANK B. McSTOCKER, of Honolulu aforesaid, Collector of Customs; DOROTHEA LAMB, of Honolulu aforesaid, Spinister; L. C. ABLES, of Honolulu aforesaid, Agent; and JAMES WOLFENDEN, of Melbourne, in Victoria, Doctor of Divinity; Carrying on the Business (Together in Copartnership) of Curing Alcoholism and Narcotism by the Hagey Formulas in the Islands of the Pacific Ocean and under the Style or Firm of The African Pacific and Indian Hagey Company, Defendants.

Take notice that unless within fourteen clear days after and exclusive of the day in which this writ shall be served upon you, you

do file in the office of this Court at Auckland, a statement of your defence to plaintiff's claim, a copy of which is hereunto annexed, the plaintiff may proceed in his action without having it heard in Court. If you file a statement of defence within the time above specified, you are hereby summoned to attend the first sittings of the Court at Auckland, which shall be held after the expiration of twenty-eight days from, but exclusive of the day of service of this writ upon
280 you, and take notice that if you fail so to appear the action may be heard and determined in your absence.

Dated at Auckland the 18th day of April, 1898.

[SEAL.]

To the above-named defendants J. A. Magoon, Frank B. McStocker, Dorothea Lamb, and L. C. Ables, and to the other above named defendants.

N. B.—This Writ is sued out by Christopher James Parr, Solicitor for the Plaintiff, whose address for service is at Nos. 103 & 104 Victoria Arcade, Queen Street, Auckland.

The Plaintiff claim- £19:17:0 for cost of service of this writ and incidental thereto.

This summons must be served on you within six months from the date thereof, or from the date of renewed.

If the last day for delivering your statement of defence fall on a Sunday or holiday, or during the vacation, such statement may be delivered on the day following such Sunday or holiday, or the vacation, as the case may be.

You are specially warned, that, if you do not file your statement of defence within the time limited, the plaintiff may proceed in his action in your absence.

If the claim is for a sum of money, and you pay such sum and costs before the expiration of the time for filing a statement of defence, proceedings in the action will be stayed; if you pay after the expiration of that time you will be liable to pay any further costs your delay may have caused the plaintiff to incur.

If you confess the plaintiff's claim, or any part thereof, you should sign and deliver your confession to the proper officer of the Court before the expiration of the time limited for filing your statement of defence; but you may deliver your confession at any time before the case is called on, subject to the payment of any further costs which your delay may have caused the plaintiff to incur.

281 If you admit only a part of the claim, you may at any time before hearing pay the amount admitted into Court, together with such amounts for costs as you may consider yourself liable, for, and you must forthwith give notice of such payment to the plaintiff. If the plaintiff proceed, and recover no further amount than shall have been so paid into Court, he may be ordered to pay any costs incurred by you subsequent to receipt of such notice as aforesaid.

Summons to secure the attendance of witnesses will be issued on application at the office of the Court.

The office hours are from 10 to 3, except on Saturdays 10 to 1, and except on Sundays and public holidays. During vacation, viz., 20th December to 31st January, the office hours are from 10 to 1. On Saturday during vacation the office hours are 10 to 12.

The Court holds 4 more sittings in the year 1898, which commence respectively

13th June,
25th July,
12th September,
5th December.

282 In the Supreme Court of New Zealand, Northern District.

No. 3608.

Between

THOMAS MILNER HARRISON, of Auckland, in the Colony of New Zealand, Solicitor, Plaintiff,

and

T. E. COWART, J. H. KIRKPATRICK, GEORGE D. MOORE, A. E. POWTER, J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA LAMB, and JAMES WOLFENDEN, Carrying on Business Together in Co-partnership in the Islands of the Pacific Ocean, Under the Style or Firm of The African Pacific and Indian Hagey Company, Defendants.

Statement of Claim.

Saturday, the 16th Day of April, 1898.

The plaintiff says:—

1. That he is a Solicitor, at present retired from practice, residing at Auckland, in the Colony of New Zealand.

2. That the defendants are the members of a co-partnership carrying on business in New Zealand aforesaid and elsewhere under the style or firm of The African Pacific and Indian Hagey Company.

3. That on the 20th day of September, 1897, at Auckland aforesaid, the defendants, as such partners as aforesaid, entered into a further partnership with plaintiff by and under a Memorandum of Agreement, a true copy whereof is hereto annexed marked "A." It was thereunder agreed that the Colony of Tasmania was to be the place or sphere of the business or operations of the last mentioned partnership, and it was further agreed that the plaintiff
283 should leave or depart from New Zealand and go to Tasmania to manage the said partnership operations or business there.

4. That the plaintiff, on or about the said 20th day of September, 1897, paid the defendants the sum of two thousand pounds (£2,000) as the consideration for his admission into partnership with them as aforesaid and for a two fifth- share in the capital, good will, and profits of such partnership.

5. That by paragraph 4 of the said Agreement the defendants (therein called the said Company) agreed with the plaintiff that if at or before the expiration of a period of six months from the departure of the plaintiff from New Zealand to Tasmania the plaintiff should be dissatisfied with the condition of the said partnership business in Tasmania the defendants would give the plaintiff stock of the market value of an amount equal to the sum paid by the plaintiff to defendants for his admission to the said partnership, that is to say, stock of the market value of two thousand pounds (£2,000) in some district (other than Tasmania) of the said Company's field of operations.

6. That the plaintiff departed from New Zealand to Tasmania on or about the 17th day of January, 1898, for the purpose of managing and carrying on the said partnership business in Tasmania.

7. That the plaintiff arrived in Tasmania aforesaid on the 1st day of February, 1898, and carried on and managed the said partnership business at the City of Hobart in Tasmania from the said 1st day of February, 1898, to the 1st day of March, 1898.

8. That the plaintiff, on or about the 10th day of March, 1898, notified the defendants that he the plaintiff was dissatisfied with the condition of the partnership business in Tasmania.

9. That the plaintiff, on or about the 10th day of March, 1898, made a demand upon the defendants in Sydney, New South Wales, that he the plaintiff required, in terms of paragraph 4 afore-
284 said, stock of the market value of two thousand pounds (£2,000) in some district (other than Tasmania), of the Company's field of operations. But the defendants have not delivered such stock, but have neglected and refused to deliver such stock to the plaintiff.

Wherefore the plaintiff prays judgment for

(1) Two thousand pounds (£2,000) damages for breach of Contract, or

(2) Such further or other order or relief in the premises as to this Honorable Court may seem just.

285 "A."

[N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of agreement made this 20th day of September 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th 1897, the said partnership being composed of the following members: T. E. Cowart, J. H. Kirkpatrick, and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison both of the City of Auckland in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered into the — day of May 1897 w-th James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using administer-ng and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now these presents witnesseth:

For and in consideration of the covenants agreements and payments hereinafter named the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own (11/20) eleven twentieths, in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said partnership hereby formed with the said remedies at the cost
286 price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed, and the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said partnership hereby formed all their rights privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of

(£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some other district of the Company's field of operation in exchange for the portion of the said (2250) two thousand two hundred and fifty pounds taken by him, and the said Company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and
287 the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

(6) That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness whereof the said parties hereto have set their hands this 1st day of October 1897.

T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
A. E. POWTER,
By His Attorney, T. E. COWART.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of
W. C. ROBISON, *N. L.*
12—107

288 PLAINTIFF'S EXHIBIT "N."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

Oct. 31. ..... £5190 — 0 — 0

Territory.

Cr.

1897.		
Sept. 22.	Gilmore % Tasmania	£250 — 0 — 0
Oct. 11.	Smith & Pollock % N. S. W.....	250 — 0 — 0
" 12.	W. J. Robinson on % of sheep sold him for £500	50 — 0 — 0
" 12.	R. K. Garlick % N. S. W.....	250 — 0 — 0
" 30.	Smith Garlick & Pollock.....	4500 — 0 — 0
		£5300 — 0 — 0

Dr.

1897.		
Oct. 12.	Paid Harrison & Gilmore our part for expenses	110 — 0 — 0
	Bal. to cr. of Territory %.....	£5190

Oct. 31, 1903.

289 PLAINTIFF'S EXHIBIT "O."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

Memorandum of Agreement.

Memorandum of agreement made this 16th day of September 1897, between The African, Pacific and Indian Hagey Company, of the one part, and Alfred Edward Gilmore and Thomas Milner Harrison both of the City of Auckland of the other part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Island of Tasmania and whereas the said Company have by contract entered into the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the R. Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using administering, and vending to others the right to use and administer the said remedies in the Island of Tasmania and in no other place or places.

Now these presents witnesseth:

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own (11/20) eleven twentieths in consideration of granting the use of the said remedies in the said Island to the said partnership; and the said company will supply the said partnership with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said company for the other (9/20) nine twentieths interest in the said partnership, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania, each at a salary of (£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid.

4. That if at or before the expiration of a period of six
290 months from the date of the departure of the said Gilmore and the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount of the (£2250) two thousand two hundred and fifty pounds mentioned in Clause two hereof, in some other district of the Companie's field of operation in exchange for the portion of the said (£2250) taken by him and the said company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send, one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same power as either the said Gilmore or the said Harrison.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business are as follows, the said Harrison to have (2/5) two fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause four (4) hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserve the right to dispose of (1/20) one twentieth interest in the partnership for the sum of (£250)) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In witness whereof the said parties hereto have set their hands.

THE AFRICAN, PACIFIC AND INDIAN HAGEY CO.,
(Sg.) T. E. COWART,
J. H. KIRKPATRICK.
(Sg.) JAMES WOLFENDEN,
291 (Sg.) L. C. ABLES, *Sec't'y & Treas.*
(Sg.) A. E. GILMORE.
(Sg.) T. M. HARRISON.

Signed in the presence of
(Sg.) D. T. FOX,
Accountant, Auckland, N. Z.
(Sg.) J. D. O'BRIEN.

292 PLAINTIFF'S EXHIBIT "P."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

Memorandum of Agreement.

Memorandum of Agreement made this 20th day Of September 1897, between The African, Pacific and Indian Hagey Company, of the one part, and Alfred Edward Gilmore and Thomas Harrison both of the City of Auckland of the other part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Island of Tasmania and whereas the said Company have by contract entered into the — day of May, 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using administering and vending to others the right to use and administer the said remedies in the Island of Tasmania and in no other place or places.

Now these presents witnesseth:

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own (11/20) eleven twentieths in consideration of granting the use of the said remedies in the said Island to the said partnership; and the said Company will supply the said partnership with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine twentieths interest in the said partnership, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of

(£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid.

293 4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore and the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some other district of the Companie's field of operation in exchange for the portion of the said (£2250) two thousand two hundred & fifty pounds taken by him, and the said company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Gilmore or the said Harrison.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business are as follows, the said Harrison to have a (2/5) two fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one twentieth interest in the partnership for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In witness whereof the said parties hereto have set their hands this 21st day of September 1897.

THE AFRICAN, PACIFIC AND INDIAN HAGEY CO.,

(S'g.) By J. H. KIRKPATRICK,
T. E. COWART.
(S'g.) JAMES WOLFENDEN.
L. C. ABLES, *Sec't & Tr.*
(S'g.) A. E. GILMORE.
T. M. HARRISON.

Signed in the presence of
(S'g.) J. B. DANIELS.
(S'g.) D. J. KIRKPATRICK.

294 PLAINTIFF'S EXHIBIT "Q."

(Indorsed.)

Filed November 2nd, 1903. T. M. Simonton, Clerk.

Memorandum of Agreement.

Agreement made this 21st day of September 1897, between Thomas Milner Harrison, and L. C. Ables both of the City of Auckland in the Colony of New Zealand.

Whereas by Agreement date- the 1st Day of November 1896 made between William Cowper Robison, sheep farmer and Lawrence Marshall Grace, Licensed Interpreter, the said Grace sold to the said Robison a Temporary Lease of the lands mentioned in the Schedule hereto, for the sum of five hundred pounds, and whereas the said Robison after the said 1st day of November 1895 undertook to give to said Grace a greater amount than (£500) five hundred pounds for the said Lease, and whereas the said Robison entered into an agreement with the said Harrison Dated the 8th day of December 1896 whereby he transferred a half of his interest in the said Lease to the said Harrison and undertook to indemnify the said Harrison against farther charges than the said (£500) five hundred pounds by the said Grace for the said Lease, and whereas by the said agreement dated 8th December 1896 the said Robison and the said Harrison entered into partnership in the possession of certain sheep grazing on the said lands, and whereas the said partnership was dissolved by an agreement dated the 4th Day of May 1897 made between the said Harrison and the said Robison, and whereas by the said agreement dated the 4th day of May 1897 the said Harrison retained possession of about (500) five hundred head of sheep grazing on the said lands until such time as the said Robison would secure the payment of (£511) five hundred and eleven pounds less the price of the wool clip of the sheep of the said partnership, and whereas the said Harrison has been obliged to pay to Freeman R. Jackson & Co. certain expenses of the said partnership accrued since the shearing of the said wool clip for which the said Robison is liable for one moiety thereof.

Now these presents witnesseth;

1. That the said Harrison hereby assigns to the said Ables
295 all right title and interest he may have in the said Temporary Lease and the sheep grazing on the said lands.

2. That at last shearing of said sheep more than (3500) three thousand five hundred sheep and lambs were shorn, and that since said shearing more than (2300) two thousand three hundred Merino ewes and eighty long wooled rams were purchased by the said Harrison and put upon the said place.

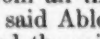
3. That of the sheep enumerated in Clause (2) two hereof not more than ten have been removed from the said place with the knowledge and consent of the said Harrison, except for consumption as mutton by the men working on the place, and the said Harrison

guarantees that the said sheep and the wool clip growing thereon are free from all indebtedness except as herein mentioned.

4. That the said Harrison hereby assigns to the said Ables all indebtedness of the said Robison to him the said Harrison.

5. That the said Ables will release the said Robison from all the said indebtedness, upon the said Robison assigning to the said Ables all interest he may have in the said Temporary Lease and the said sheep grazing on the said lands, and a certain Promissory Note for (£38) given by the said Harrison to the said Robison.

6. That the said Ables will not release the said Robison from any of the said indebtedness until the said Robison deliver to him the said note and that the said Ables on obtaining the said note will release the said Harrison from payment thereof and deliver the same to him.

7. That the said sheep are ear-marked ewes and rams  or wethers the reverse.

8. That in consideration of this assignment the said Ables has paid the said Harrison the sum of (£2000) two thousand pounds the receipt whereof is hereby acknowledged.

THE SCHEDULE.

All those pieces or parcels of land situate in the district of Tauponuiata in the provincial District of Wellington containing 24486 more or less being Tawhai South 2000 acres Okahukura No.
296 7 10000 cares Okahukura No. 8 6766 acres Okahukura No. 8a 592 acres Okahukura No. 8a2 300 acres Okahukura No. 8b 892 acres Okahukura No. 8c & d 892 acres No. 8e & f 892 acres Okahukura No. 8g & h 892 acres Okahukura numbers J. K. 7 L. 600 acres Taurewa No. 2a 500 acres and Taurewa No. 3. 160 acres.

In witness whereof the said parties hereto have set their hands the 21st day of September 1897.

(S'g.) L. C. ABLES.
(S'g.) T. M. HARRISON.

Signed in the presence of
(S'g.) J. B. DANIELS.
(S'g.) D. J. KIRKPATRICK.

297 PLAINTIFF'S EXHIBIT "R."

(Indorsed.)

Filed Nov. 2, 1903. M. T. Simonton, Clerk.

Memorandum of Agreement.

Agreement made this 1st day of October, 1897, between Thomas Milner Harrison and L. C. Ables, both of the City of Auckland, and William Cooper Robison of Kihikihi.

Whereas by agreement dated 21st of September, 1897, between the said Harrison and the said Ables the said Harrison did assign to the said Ables certain claims he had against the said Robison

and certain interests he had in Okahukura and other lands in West Taupo and whereas the said Robison had certain interests in certain sheep grazing on the said lands;

Now these presents witnesseth:

That the said Ables and the said Harrison release the said Robison from all claims whatsoever they may have against him.

2. That the said Robison hereby assigns to the said Ables all interest he may have in the said sheep.

3. That the said Robison hereby agrees to assign to the said Ables at any time upon the demand of the said Ables any interests he may have in the said lands.

In witness whereof the said Thomas Milner Harrison, the said L. C. Ables and the said William Cowper Robison have set their hands the day aforesaid.

T. M. HARRISON.
L. C. ABLES.
W. CR. ROBISON.

Signed in the presence of
J. H. KIRKPATRICK,
Auckland, N. Z.

298 PLAINTIFF'S EXHIBIT "S."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

Liquor Treatment Instructions.

Hagey Treatment.

Examine patients thoroughly before entering treatment, especially as to heart trouble, etc. After

Never use over two or three drops of the hypodermic injection solution to begin with, and gradually increase till patient shows no idiosyncrasy in relation to the drug. Should the patient show the least signs of flightiness reduce the hypodermic dose *at once*. After a little experience in this line a Physician can handle his patient and can tell at a glance whether he is giving sufficient treatment. Often question patients at treatment time as to how they feel, if any dryness in the throat, etc.; no two patients are alike and individual treatment is necessary.

Always be prompt at treatment time and insist that your patients are the same. Run your institute on business principles; it has a good effect. Be kind to your patients, but be firm and when you tell them anything give them to understand that it is law from the word go.

If any patient insists on disobeying the rules, such as going into saloons; drinking on the sly, etc., and will not attend to business, turn him out of the Institute using as much kindness as possible

Your graduates always act as detectives and patients will find it very difficult to take drink on the sly without you finding it out. If for any reason you should suspect a patient of having taken a drink on the sly, convince yourself that it is so first, and then, without saying a word to him at the next treatment time, instead of the regular hypodermic injection give him, One Tenth Grain (1/10 Gr.) of No. 10, carefully prepared a few minutes before, so that you will be ready for him when he presents himself for treatment. It is best to be very guarded, using careful judgment, as regards giving No. 10 to patients seriously affected with heart troubles or when they are in a beastly drunken condition.

Never allow your patient to drink for more than from one to three days after commencing treatment. We furnish you with a bottle of tonic labeled "B tonic;" if your patient is still drinking after two or three days' treatment, instead of giving him the regular whiskey tonic give him a spoonful of B tonic in the same manner as you give the regular tonic treatment; this is milder than the No. 10 and will make the patient quite ill at his stomach as some patients must be made very sick before they will quit.

299

Keep all your medicines and what you give your patient a profound secret and impress upon their minds that the medicine will quiet a sick stomach if they will let whiskey alone, but that the two will not mix.

To quiet a patient who is very nervous the use of bromides (bromidia, etc.) is recommended. The Physician in charge is the best judge of this and when and what to give. These are the main points to be kept in view as to the general mode of running a successful Institute.

Do not take morphine patients until you have treated and cured a few liquor patients; you will then have *have* experience and will know *know* better how to proceed with general treatment for morphine, etc.

Important: Insist on baths being taken at least twice a week; *this must not be omitted.*

We also send you a supply of No. 7; mix one spoonful with two spoonfuls of whiskey.

Questions.

Physician's Examination for Narcotism.

No. 1. When you receive a patient for Morphine, opium, &c., &c., what are the first steps to be taken?

No. 2. Would you tell a patient that it would be necessary to put a guard over him?

No. 3. If he has been taking morphine, &c., hypodermically, how would you proceed and how would you supply the place of morphine?

No. 4. How would you prepare the morphine mixture?

No. 5. How would you prepare the opium mixture?

No. 6. After the patient has been taking the treatment for a few days, and should show signs of flightiness, what would you do?

No. 7. What tonic would you use for Narcotism, and Neurasthenia?

300 No. 8. What hypodermic?

No. 9. In giving patient Institute treatment for tobacco, what tonic would you use?

No. 10. What would you give patient to produce sufficient sleep?

No. 11. How long should a patient be under treatment before he should be off of the morphine, &c.?

No. 12. At this stage will it be necessary to impress upon the guard to be especially watchful?

No. 13. What would you give the patient at this stage to produce quite and allay pain, if any?

No. 14. What else would you give?

No. 15. After the patient has been off of morphine, &c., for a week or at such time as you thought them cured, how would you make a test of it?

No. 16. What would you tell them would be the result if they took any more morphine, &c.?

No. 17. Are baths necessary in this treatment?

301 *Answers to Physician's Examination for Narcotism.*

For the Physician Only.

No. 1. Take all morphine, syringes, &c., &c., away. Examine your patient thoroughly, and ascertain what superinduced the taking of the drug.

No. 2. Tell the patient that after the first week, it will be necessary to put a trusty guard over him or her, and when you do this be sure that the patient has no drugs concealed. Morphine patients will *not* tell the truth when it comes to the matter of taking the drug, and you cannot place one bit of confidence in what they say. They will not tell the truth, none of them, no matter how honest they tell you they are; you must not believe all they say, though you should impress them that you do. Should the patient refuse a guard, tell him you cannot cure them unless under guard, and permission from some of the relatives will put the physician in a position to force the guard upon the patient.

No. 3. Remove all morphine as above, and supply the place with morphine mixture.

No. 4. Fill an 8 ounce bottle with water and add one dr. bottle of morphine sulphate to it, seeing that it is well dissolved. Give your patient a teaspoonful of this mixture every two hours, should they require it that often. Fill the bottle full of water every morning to supply the amount taken out the day before. You need not let your patient know that it is water you refill with, unless you choose to do so. At the end of 10 or 12 days the morphine will be getting very weak and the patient will be getting very little if any morphine,

and at this time you should have another bottle (exactly like the one containing the morphine mixture) and fill it with water adding quinine or nux vomica, to give it the bitter taste, and make a secret exchange with your patient.

302 No. 5. Take the usual morphine mixture, and add sufficient tonic (morphine) to give it the color.

No. 6. Decrease the hypodermic injection.

No. 7. Morphine tonic.

No. 8. Same as liquor.

No. 9. Morphine tonic; also give morphine tonic for the combined habit of morphine and liquor.

No. 10. Physicians should use their best judgment in giving some of the best and most harmless hypnotics such as sulfonel, antikamnia, &c.

No. 11. Usually not over 12 days; in rare cases, a few days longer may be necessary.

No. 12. Decidedly so. Should not leave his patient under any circumstances.

No. 13. Suppositories are good; the physician should use his best judgment.

No. 14. Codine is splendid substitute for morphine, and does not leave any appetite for the drug.

No. 15. Give them dose of quinine, and tell them it was morphine, then immediately follow with No. 10 instead of the regular injection.

No. 16. It would kill them.

No. 17. Certainly they are.

No. 10 will invariably break up paroxysms; even B. Tonic is splendid. Of course judgment must be used by the physicians. No 10 has often broken up delirium tremens as well as hysterics.

303 *Tobacco Habit.*

Instructions. Chewing.

The patient is advised, if the habit is that of chewing, to discontinue the use of tobacco at once, and substitute the "LANGE'S PLUG" or chewing gum which is furnished with the remedy. When the desire to chew, cannot be resisted, the patient should take a chew of the Plug or gum chewing in the same manner as if it was tobacco, swallowing the saliva, as no harmful results follow. As the remedy continues to make its effects felt, and the nicotine poisons are eliminated, drop the use of the Plug or gum and continue with the treatment.

Smoking.

If the habit is that of smoking, the patient is advised to frequently place a cigar in his mouth, and indulge in what is known as a "dry smoke" and to light his cigar only when the desire is too strong upon him. As the remedy begins to make its effects felt the patient will find that he can drop one smoke after another, until finally smoking

becomes obnoxious to him, and so the use of tobacco in any form for all time.

304 Cigarrette Smoking.

For this habit the patient must stop their use at once, substituting cigars as directed in the tobacco smoking habit. Follow the instructions already given you and handle the patient accordingly.

Take a Test.

It is a fact known to nearly every user of tobacco, that the first chew or smoke indulged in when a boy, causes a deathly sickness, the treatment places a patient exactly in the same condition or at least that is what you ought to impress upon the mind of your patient. After your patient has been off of tobacco about 10 days tell him you want to make a test, and just before "shot time" supply him (or better still let him supply himself) with a good cigar, and see that he does not light it till just before shot time then give him No. 10 instead of his regular injection. Follow the same instructions for chewing or cigarrette smoking.

PLAINTIFF'S EXHIBIT "T."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

HOTEL METROPOLE,
SIDNEY, 10*th March*, 1898.

J. H. Kirkpatrick, Esq., Hagey Institute.

DEAR SIR: You asked me yesterday to make a written offer of what I should be willing to take in settlement of my claim against the partnership of which you are a member. My claim, of course, is for stock of the market value of two thousand pounds. I placed the matter some time ago in the hands of Mr. Parr, my solicitor at Auckland, and any offer I herein make is not to prejudice any action of his in this matter, either, past, present or future.

I should, at present, in settlement of this matter be willing to accept (£1900) one thousand nine hundred pounds cash and one hundred pounds stock in any of your companies now formed. This offer does not remain open but must be accepted immediately. 10/3/98.

Yours truly,
(Sg.) T. M. HARRISON.

P. S.—In event of this offer being accepted the cash payment must in some way be secured before the end of this week.
(Sg.) T. M. H.

305 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON (*née* LAMB) ET ALS., Defendants.

It is hereby stipulated and agreed between the parties to this action that the plaintiff may remove from the files of this Court the Memorial of Judgment obtained by him in The Supreme Court of New Zealand against all the defendants herein except Powter and Wolfenden; and that a copy of said Memorial of Judgment certified by the Clerk of this Court to be true may be substituted on the said files for the said Memorial of Judgment; and that said copy so certified as true will be accepted in evidence in all the Courts of this Territory by all the parties to this action as though it were the said original Memorial of Judgment.

Dated Honolulu, H. T. 18th January 1905.

(Sgn.) KINNEY, McCLANAHAN & COOPER,
Attorneys for the Defendants.

(Sgn.) T. M. HARRISON, *Plaintiff.*

Endorsed and filed Jan. 20, 1905. Geo. Lucas, Clerk.

306 PLAINTIFF'S EXHIBIT "U."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

In the Supreme Court of New Zealand, Northern District.

No. 3608.

Between
THOMAS MILNER HARRISON, Plaintiff,
and
THOMAS EDWARD COWART, J. H. KIRKPATRICK, GEORGE D. MOORE, A. E. POWTER, J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA LAMB and JAMES WOLFENDEN, Carrying on Business Together in Co-Partnership in the Islands of the Pacific Ocean under the Style or firm of "The African Pacific and Indian Hagey Company," Defendants.

This action coming on for trial on the thirteenth day of June 1899 before His Honor Mr. Justice Conolly and a common jury of twelve persons, after hearing the plaintiff and the defendant Thomas Edward Cowart, and the evidence by them respectively adduced and it appearing that the defendants J. H. Kirkpatrick, George D. Moore,

J. A. Magoon, F. B. McStocker, L. C. Ables, and Dorothea Lamb have been duly served with the Writ of Summons and Statement of Claim in this action but have not filed any defence thereto and the jury having found that the plaintiff is entitled to judgment for the sum of two thousand pounds (£2000).

It is adjudged that the plaintiff recover against the said defendants Thomas Edward Cowart, J. H. Kirkpatrick, George D. Moore, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb the sum of two thousand pounds (£2000).

Dated the 13th day of June 1899.

[Seal of the Supreme Court of New Zealand.]

By The Court,

R. G. THOMAS,
Deputy-Registrar.

In the Matter of the Hereinbefore Typewritten Memorial of Judgment.

306½ I, Henry Clayton Brewer, of the City of Auckland, in the Colony of New Zealand, Registrar of the Supreme Court of New Zealand, Northern District, at Auckland aforesaid, do solemnly and sincerely declare.

1. That I am the Registrar of the said Court, Northern District, at Auckland aforesaid, and the Legal Keeper of the Judicial Record of which the said Memorial is a true copy.

2. That the seal attached to the said Memorial is the seal of the said Court, and the signature "R. G. Thomas" attached to the said Judgment is the signature of my Deputy-Registrar.

3. That the seal attached to this Declaration is the seal of my office as Registrar aforesaid.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an act of the General Assembly of New Zealand intituled "The Justice of the Peace Act 1882."

HENRY CLAYTON BREWER.

Declared at Auckland aforesaid this fifth day of October 1899, before me.

[Seal of Registrar Supreme Court of New Zealand.]

JNO. C. BASSETT,
A Solicitor of the Supreme Court of New Zealand.

I, Edward Tennyson Conolly certify.

1. That I am the judge of the Supreme Court of New Zealand, who presiding alone, tried the action-at-law mentioned in the hereinbefore typewritten Memorial of Judgment.

2. That the hereinbefore written signature "Henry Clayton Brewer" is the true signature of the Registrar of the said Court, Northern District at Auckland aforesaid.

3. That the said Registrar is the Legal Keeper of the Judicial Record of which the hereinbefore typewritten Memorial of Judgment is a true copy.

4. That the hereinbefore Declaration made by the said Registrar is a corect form of attestation according to the law of New Zealand, and subjects *to* said Registrar to the pains and penalties of prejury, if false.

EDWARD TENNYSON CONOLLY,
One of the Judges of the Supreme Court of New Zealand.

I Frank Dillingham, Consul of the United States for the Colony of New Zealand, hereby certify.

That the above signature "Edward Tennyson Conolly" is the true signature of His Honor Mr. Justice Conolly, the Judge of the Supreme Court of New Zealand, who, presiding alone, tried the action-at-law mentioned in the hereinbefore typewritten Memorial of Judgment.

[SEAL.]

FRANK DILLINGHAM,
Consul of the United States for the Colony of New Zealand.

307 I, George Dunnet, Junior Consul of the Republic of Hawaii for the Colony of New Zealand, hereby certify.

That the above signature "Edward Tennyson Conolly" is the true signature of His Honor Mr. Justice Conolly, the Judge of the Supreme Court of New Zealand, who, presiding alone, tried the action-at-law mentioned in the hereinbefore typewritten Memorial of Judgment.

GEORGE DUNNET,
Junior Consul of the Republic of Hawaii for New Zealand.

I, George Lucas, Clerk of the Supreme Court of the Territory of Hawaii, hereby certify, that the above typewritten document is a true copy of a Memorial Judgment, filed, in the action-at-law between Thomas Milner Harrison—*vs.*—J. A. Magoon, L. C. Ables, F. B. McStocker, *et als.* that, according to a stipulation filed by the parties to the said action; is about to be removed from the files of this Supreme Court for the Territory of Hawaii, and this copy substituted therefor.

Dated Honolulu, H. T. 20th January 1905.

(S'g'n.)

GEORGE LUCAS,
Clerk of the Supreme Court for the Territory of Hawaii.

308 DEFENDANTS' EXHIBIT "1."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

N. Z. HAGEY INSTITUTE, LTD., *Jan.* 21*st*, 1898.

Per "Mariposa."

DEAR MAC: I had until late tonight expected to return by this steamer but have just concluded to run over to Sydney and Melbourne and will leave here Monday and will be home by next steamer.

My friend Connelly returns to the U. S. by next "Alameda." I note in Magoon's letter to Dexter that he (Dexter) is to act for J. A. M., Dora Lamb and yourself. But as you said nothing regarding the matter to me, I have done nothing in the matter and as it is a matter that will keep, will say no more until I see you. I think J. A. is making a mistake and think Dexter showed good judgment in not putting in the papers here the notices as directed they could do no good and would I am sure some harm.

I am leaving my power of attorney with Kirkpatrick and were I advising you, I would say do the same, but as I have said it is a matter that will keep.

Yours Faithfully,

LEM C. ABLES.

309 DEFENDANTS' EXHIBIT "2."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

THE HAGEY INSTITUTE,
AUCKLAND, N. Z., *Sept.* 2, 1897.

MY DEAR MAC: I did not write you last mail but am presuming you heard from me, and I am not writing you much today. I hope you keep your own council as I think this between you and I that I have my hands full to get *anything* for you and I to say nothing of the others, and as Magoon has put his affairs with the other parties I prefer it remain that way. I am giving you my opinion in a very few words. *We are in a box* and the only way to get out is to hang on and if you die and I die I will do *my best* to see they go down in the boat with me. It is a hard go and I am just about out of meat but I still live. I can't enter into particulars, it would do no good and it is beyond my powers to do the subject justice. Keep this under your own vest. Write me, and believe me

Yours Faithfully,

LEM C. ABLES.

310 DEFENDANTS' EXHIBIT "3."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct. 1st*, 1897.

DEAR MAC: Yours to hand and the contents all noted but I must say that part relating to business is beyond my understanding and leads me to believe that you cannot comprehend the true situation of affairs here. I mail you statement of affairs for months endings Aug. 31 and Sept. 30, and presume Mr. Cowart & Kirkpatrick are writing Magoon undoubtedly they will write in glowing colors of the business which if it is all correct all of us are O. K. I will simply say this I personally can't see it in that light. I wish I could. I certainly would feel better satisfied. In my statements I have not said anything of the new plan of operations as outlined by them. I only know that some parties here have gone in with us and they put up enough to purchase a house and lot, furniture *and* etc., and the people who put up the money hold a lien on the same and are the managering directors and are guaranteed 10% on their investment. While there are some features in the plan I heartily approve of I did not think enough of the scheme to sign any of the papers. Neither did Col. Moore. Now then Mc., I can not enter into all details and explain in the time the status of how things stand, and if I was to write a book many things would look to you so absurd that you would believe me either a liar or a fool or probably both. I figure it this way, we are in a copartnership and they are the managering partners and we are also bound to pool our interest and not sell without the consent of the other partners. I may be wrong, but I think we are taken in and done for, and that we will never see our money again. Mind you Mc. this is simply my individual opinion and I don't want you to use it only in making your own deductions. I can't stay here the balance of my life and live on wind, and to prove to you that I am in earnest in my belief I want to tell you this I am trying to make a deal with them to set me off with a piece of
311 territory to work on my own a/c I don't think they will even do this but if they do, I will reserve the right for you to take you- choice either to leave your interests as they are with them or to take a part of the territory with me. I don't want to decide this question for you or any one but myself. I have thought of every plan possible to try and get out and this plan I admit is something like the dying man and the straw but I have fully decided this is my last chance. You can say hold on and do this and do that, but I tell you old man, this is Hell, and I can't live even in Hell on nothing. I never put in such a time since I was born and I can't hold out any longer. I want you to get me a copy of agreements and copy of all papers appertaining in any way to this business. The ones I had I lent them for references and they will not let me have them back again. I paid them for medicines from Honolulu, $230, or £47—00

this was supposed to be for 46 treatments put it really treated only about 25 patients they stated Dr. Wayson had written for that amount, find out if the money has been received in Honolulu, if not and we owe the institute there anything have them send me a bill asking the same be remitted. Also find out for me what the Institute there can furnish me the treatments F. O. B. there guaranteed the Simon pure article and to be the full compliment necessary for a patient; don't forget this.

One thing more, and I will close Col. Moore and I have been thinking and talking of his going to Honolulu and Texas by this steamer we are anxious to put ourselves right in the eyes of you at Hono. and those we believe to be interested back in Texas. Moore has no money neither have I unless I float a loan and as it would take about $600 to make the trip I have concluded at the last moment not to borrow the money. If it was sure to be proportioned fairly between all parties interested I am sure it would be money well invested but I can't take all the chances.

I have just enclosed herewith a letter from Beal & Beole this just now came to me. I think the same self explanitory. I call it a little game of bluff as I have told them I would not sign. I don't
312 propose replying to it. I believe I said Beal is to have in addition to fees the amount of £1000 stock my authority is Mr. K. This is for working a scheme that not a penny goes to our Treasury.

But enough for this time only this don't forget to give me what I have asked for. I don't know of course, how J. A. M. is hooked up I only imagine that he would put more stock in them than he would in me, that of course, is his privilege.

Certainly hope I am wrong in my conclusions and if so, I will be willing to acknowledge my mistake at present Daniel's is the great mind and confidential advisor.

Trusting this finds yourself and family well and prospering, I am with kind regards to them all

Yours faithfully,

L. C. ABLES.

Cash	£320 — 12 — 9	
Stock %	20487 — 17 — 2	
T. E. Cowart stock.....		5713 — 4 — 0
J. H. Kirkpatrick "		5713 — 4 — 0
A. E. Powter "		2062 — 6 — 0
G. D. Moore "		371 — 6 — 0
J. A. Magoon "		2250 — 0 — 0
L. C. Ables "		1440 — 0 — 0
F. B. McStocker "		900 — 0 — 0
Dora. Lamb "		450 — 0 — 0
J. Wolfenden "		2100 — 0 — 0
T. E. Cowart Private.....		190 — 0 — 0
J. H. Kirkpatrick "		190 — 0 — 0
J. Wolfenden "		57 — 16 — 4
L. C. Ables "		190 — 0 — 0
J. B. Daniels "	84 — 0 — 0	

Expense	1505 — 7 — 5	
Alchoholism		479 — 6 — 0
Morphine		26 — 5 — 0
Nervousness		14 — 10 — 0
Territory		250 — 0 — 0
	22397 — 17 — 4	22397 — 17 —4

313 *Trial Balance August* 31, 1897.—*M. T. Simonton, Clerk.*

Cash on Hand	£159 — 3 — 6	
Stock %	20487 — 17 — 2	
T. E. Cowart stock %		5713 — 4 — 0
J. H. Kirkpatrick " "		5713 — 4 — 0
A. E. Powter " "		2062 — 6 — 0
Geo. D. Moore " "		371 — 6 — 0
J. A. Magoon " "		2250 — 0 — 0
L. C. Ables " "		1440 — 0 — 0
F. B. McStocker " "		900 — 0 — 0
Dora. Lamb " "		450 — 0 — 0
J. Wolfenden " "		2100 — 0 — 0
T. E. Cowart Private %	5 — 0 — 0	
J. H. Kirkpatrick " "	5 — 0 — 0	
J. Wolfenden " "	35 — 18 — 8	
L. C. Ables " "	5 — 0 — 0	
J. B. Danieis	64 — 0 — 0	
Expense	605 — 18 — 8	
Alcoholism collects		338 — 13 — 0
Morphine "		26 — 5 — 0
Nervousness "		3 — 0 — 0
	£21367 — 18 — 0	£21367 — 18 — 0

Aug. 31, 1897.

Amount due not collected £371 — 7 — 0.

Of Expense % £605 — 18 — 8 abount £100 is in furniture and *furniture.*

The amounts charged to personal % is the amounts drawn by the several parties on % of salaries due them.

The amount of stock to the several parties is on the basis of £21000 for N. Z. and Australia to which Dr. Wolfenden was taken in the Company giving him a 10% interest, which was I believe fully explained by Mr. Cowart & Kirkpatrick in letter to J. A. Magoon. Aside from this the territory of Africa remains the property of the following as per statement on page 3.

314 *Recapitulation.*

Cash brought from Honolulu	£512 — 2 — 10
Collected from Alcoholism treatment	338 — 13 — 0
" " Morphine "	26 — 5 — 0
" " Nervousness	3 — 0 — 0
	£800 — 0 — 10

Paid for Sundry Expenses ..	£605 — 18 — 8	
" to Cowart %	5 — 0 — 0	
" " Kirkpatrick	5 — 0 — 0	
" " Ables	5 — 0 — 0	
" " J. Wolfenden	35 — 18 — 8	
Balance Daniels	64 — 0 — 0	
Balance of Cash	159 — 3 — 6	
	£880 — 0 — 10	£880 — 0 — 10

E. & O. E.
(Sg.) L. C. ABLES, *Treasurer.*

Auckland, N. Z., Sept. 9, 1897.

African Territory $500.00

To Sundries.

T. E. Cowart.....	$15114.30
J. H. Kirkpatrick	15114.30
A. E. Powter	5456.20
George D. Moore	981.90
J. A. Magoon	5952.30
L. C. Ables	3809.50
F. B. McStocker	2381. "
Dora. Lamb	1690.50
	$50000.00

315 DEFENDANTS' EXHIBIT "4."

(Indorsed.)

Filed Oct. 30, 1903. M. T. Simonton, Clerk.

HAGEY INSTITUTE, AUCKLAND, 11/26/97.

MY DEAR MAC: Yours and one from J. A. M. to hand by mail the lat-er I have neither time or inclination to answer as regards his power of attorney. I haven't asked for it and would not of had it, if it had been offered me, that as Treasurer he looks to me & etc. I have done my duty as best I could and all moneys due him have been paid his legal representative. Regarding all your suggestions I can only say as I have said before you know nothing of the situation and it is beyond me to explain it and I do not intend trying. I quite agree with Col. Moore both C. & K. have many fine qualities, as regards the business Cowart is the whole works and he knows nothing of business, he catches suckers and when there are no suckers he is out of his element. I am going to do this I give away my inter-st to a friend of mine J. D. Connelly and if he ever gets anything he divides. I expect to leave here in a few days for Sidney and from there home. The project which they got into and the one I would not sign is comeing just about as I prophesized, and I can

stand it no longer. I don't think there is anything to be gained by sending John Good here at present. However, if you and Magoon think so, don't hesitate to cancel my power of att'y, and do so my idea is to wait until you sue me or hear from me again. I like John Good as you know he is my particular friend but Connelly is the man if he can be got. I have been nearly worked to death lately but have found time nights to make a copy of my books, which I will carry away with me. We have had no fights lately as I found myself alone and could do nothing as I wrote before, I have made a hard fight and I don't feel that I have been appreciated. Cowart pretends to have some schemes on, what they are I don't know. We are running behind fast and are out of coin. Cowart K. Wolfenden and myself have lent the Co. money. I put up £14 for myself and £9 for your or 1%, how the expenses are to be met is beyond me.

I send you copy of Oct. Trial Balance as something may keep
316 me in the Colonies you had best write me and send care Steward of steamer and if they do not see me have them bring letters back to Honolulu.

I can think of nothing more only to say, this J. D. Connelly is the late U. S. Consul here and is a gentlemen and a man of brains and is popular here he knows all the men here who have associated themselves with the Hagey and is well posted regarding affairs here. If you or Mr. Magoon care to write him I believe he could give you some facts worth knowing.

With nothing more and with kind regards to all.

I am Faithfully Yours,

(Sg.) L. C. ABLES.

317 *Trial Balance Oct.* 31, 1897.

C. B. Cash	94 — 7 — 8	
1. Capital Stock	21000 — " "	
3. T. E. Cowart stock %		5713 — 4 — "
4. J. H. Kirkpatrick "		5713 — 4 — "
5. A. E. Powter "		2062 — 6 — "
6. Geo. D. Moore "		371 — 6 — "
7. J. A. Magoon "		2250 — 0 — "
8. L. C. Ables "		1440 — 0 — "
9. F. B. McStocker "		900 — 0 — "
10. Dora Lamb "		450 — 0 — "
11. J. Wolfenden "		2100 — 0 — "
18. J. B. Daniels		30 — 0 — "
25. Expense	2105 — 1 — 4	
32. Alcoholism		1199 — 15 — 6
40. Morphine		84 — 0 — 0
43. Nervousness		14 — 10 — 0
44. Territory		5190 — 0 — 0
46. E. Griffin	1 — 0 — 0	
51. Dividend	3780 — 0 — 0	
53. A. W. Currie	26 — 5 — 0	
" H. J. Ellis	26 — 5 — 0	
" G. F. Hill	11 — 5 — 0	

54. D. T. Fox	21 — 5 — 0		
" Rob't Rew	16 — 5 — 0		
" Sir Morris Rake	13 — 15 — 0		
55. Miss Oldham	1 — 5 — 0		
" R. G. Bromley	26 — 5 — 0		
" Geo. H. Campbell	11 — 5 — 0		
56. M. O'Brion	21 — 7 — 6		
" R. A. Case	26 — 5 — 0		
" Hugh Kirkwood	26 — 5 — 0		
57. Alex. McMintie	13 — 19 — 0		
	27222 — 0 — 6	27518 — 5 — 6	

318

Amts. brot. Ford.....	£27222 — 0 — 6	27518 — 5 — 6
57. Dr. Bewes	26 — 5 — 0	
" Harry Meyers	21 — 5 — 0	
58. F. A. Chapman	16 — 5 — 0	
" Jas. Pollock	26 — 5 — 0	
59. John Cafferty	26 — 5 — 0	
" Joe Hemns	26 — 5 — 0	
" Mis. D. Archer	16 — 5 — 0	
60. Wm. T. Reardon	26 — 5 — 0	
" Joseph Gilmore	21 — 5 — 0	
" C. J. Hall	21 — 5 — 0	
61. Wm. W. Courer	26 — 5 — 0	
" Henry Le. Houx	21 — 5 — 0	
	£27518 — 5 — 6	27518 — 5 — 6

319 DEFENDANTS' EXHIBIT "5."

(Indorsed.)

Filed Oct. 30th, 1905. M. T. Simonton, Clerk.

SEPT. 23RD, 1897.

Ruby A. Dexter, Auckland, New Zealand.

MY DEAR RUBY: This will serve to introduce you to Messrs. Cowart and Kirkpatrick with whom Miss Lamb and I are associated in the business of the Hagey Institute.

We wish you to represent us in ascertaining the exact financial condition of the business at Auckland. L. C. Ables, whom you have doubtless met down there, was to have sent us full particulars of the business and as he has entirely failed to do so, we would be glad to have you represent us in the matter. Mr. Cowart and Kirkpatrick will give you any assistance necessary.

There is another matter that we wish you to undertake for us. Messrs. Cowart and Kirkpatrick have signed, or are about to sign, an agreement, guaranteeing to certain gentlemen in Auckland ten per cent. on an amount of money to be invested in the business.

In a moment of enthusiasm they have appeared entirely to overlook the fact that according to our agreement they cannot bind the members of the company in any way, I think that immediately the fact is put before them they will see the necessity of explaining to these gentlemen that they had exceeded their authority, as Miss Lamb and I refuse to be bound by any such agreement on their part. Should they have signed the agreement and bound us and should they not see the necessity of withdrawing such an agreement, then we wish you without any delay to call upon the gentlemen and notify them that Cowart and Kirkpatrick have exceeded their au-
320 thority. I feel sure, however, that this will be unnecessary when Cowart and Kirkpatrick realize what they have done, they will do all they can to rectify such an error.

This business is of great importance to us and we should like you to attend to it at your earliest possible convenience and not to allow anything to prevent you from carrying out exactly what we have told you.

With aloha from us both,

We remain,

Yours very truly,

J. ALFRED MAGOON,
DOROTHEA LAMB.

321 DEFENDANTS' EXHIBIT "6."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

SEPT. 23RD, 1897.

Ruby Dexter, Care of Dexter and Crozier, Auckland, New Zealand.

DEAR RUBY: We enclose you herewith a copy of letter to Messrs. Cowart and Kirkpatrick of the Hagey Institute. We wish you to represent us in ascertaining the exact financial condition of the business at Auckland. According to our agreement the business cannot contract any liabilities of any nature, a fund was provided which was considered sufficient to pay all the expenses of the establishing of the business and no liabilities beyond this were to be erected. We asked Mr. Ables to give us a regular statement of the business which he has utterly failed to do, I understand that he is quarrelling with Cowart and Kirkpatrick. What we are willing to do is to sell out our interest there, the actual cash we have invested is about Twenty-one Thousand Dollars, for this we ought to get at least Thirty Thousand Dollars. I do not wish for you to make a propostion for this but invite them to make a proposition and then attempt to make the very best possible terms that you can from them and let us know the result of what you have done. Any sale must be for spot cash and nothing else. You will see by the enclosed letter that Cowart and Kirkpatrick have attempted to make an agreement with certain gentlemen there whereby a certain amount of money was to be put

in the business and a guarantee of 10% on the investment given.
This is absolutely without authority and must be immedi-
322 ately remedied. Tell Cowart and Kirkpatrick that your instructions are peremptory that no such agreement is to be entered into and in case such agreement shall have been already made, tell them they must immediately procure its rescission. Do not delay at all in this matter, in case they fail to accomplish it within a reasonable time, say two or three days, then you will be obliged to see the parties with whom the agreement has been made and notify them that it is without authority. This Matter is of Great Importance because these men must not be misled into investing money under a mistaken apprehension of the fact to their detriment. I am sure that Cowart and Kirkpatrick would not do anything to prejudice our common interest but they certainly have been misled by their enthusiasm into going beyond anything that I ever dreamed of.

In case you continue to represent us there in this matter you might state what your charges would be for doing it per month. Knowin- that your time is valuable we expect to give you what is reasonable for your services.

I learn from your mother that you are doing well and are prosperous in your business. Hoping that such will continue to be the case,

I remain,

Yours very truly, J. ALFRED MAGOON.

323 DEFENDANTS' EXHIBIT "7."

(Indorsed.)

Filed Oct. 30, 1903. M. T. Simonton, Clerk.

SEPT. 23RD, 1897.

FRIENDS COWART AND KIRKPATRICK: Your letters and enclosures came duly to hand last Saturday and we thank you for the same.

I do not fully understand the meaning of the document that you sent to us. You will see by the Articles of Co-partnership that the Company is to create no liabilities whatever and it is incomprehensible to me how you would entertain a proposition to guarantee to any one 10% or any other sum. I know how anxious you are to make the business succeed and perhaps in a moment of enthusiasm when you have so much at stake, you have been tempted to entertain this kind of a proposition but it is not in my opinion a business proposition that would have a tendency to benefit either you or us, and it is hardly necessary for me to say that you can under no circumstances, make an agreement binding the company or the members of the company to anything. I had full confidence in you both when Miss Lamb and I gave you the Power of Attorney but if I thought there was any possibility of your even entertaining such a proposition * * * as the one submitted to us, I should revoke it immediately. Of course we are very much disappointed in Ables

and in view of that fact we decided to ask Mr. Ruby Dexter to work with you in our common interest so you will kindly give him such data as he may wish for concerning the condition of the business. I do this with no intention of annoying or embarrassing you in the prosecution of the work, but we must have a statement of the financial condition of the business. Of course you were not expected to give this but as we must have it perhaps you will give it to us * * * with Ruby Dexter so that we can get the exact figures. In this connection I will also say that in sales of territory nothing but cash can be accepted, any formation of new companies for the purpose of purchasing real estate or anything else does not belong to our business.

324 I wish to say on behalf of Miss Lamb and myself that in case Ables continues to act the way you state we would not consent to the payment of his salary, and should want you to assist us in discontinuing him as Treasurer. Of course this must rest in your hands as you are on the grounds and know what is best to do.

The business here has entirely collapsed. It seems to me to be misleading in view of what we have written to you to state that 5% a month is paid. It is true that the dividends were paid of 5% each but that is all. I do not wish to be put in a position of endorsing anything that is not litterally true. The formula is undoubtedly one of the best things in the way of medical discoveries known and does not require any misleading statements to bolster it up. In addition to the reluctance that I have to father a misleading statement, it certainly would be a damaging thing for you to ask people in Auckland to believe you when it is absolutely certain that within a short time they will find out the true facts namely that the cure is not infallable.

Hoping that you are well and with our best wishes.

I remain,

Yours very truly,

(Sg.) J. ALFRED MAGOON.

325 DEFENDANTS' EXHIBIT "8."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

Dictated.

DEC. 16, 1897.

DEAR RUBY: I was very much disappointed in not receiving a letter from you by the last mail. I know full well that you said you could not represent me, but I was in hopes that you could do all that I required of you in my last letter. Despite the fact that you cannot represent me, I shall ask you to do this favor for me. I wish you to do what you can to carry out the instructions contained in this letter, and when that is accomplished, I feel that I will not be obliged to trouble you further. I enclose a check for five pounds, with which I wish you to retain, in your judgment, the best lawyer in Auckland,

a man that is thoroughly honest and reliable, and who understands his business. Before you pay him the money, state the nature of the business to him, agree with him what his full fee will be In no case will I agree to pay at this time more than twenty pounds. I think you will be able to get a good man under this arrangement. I wish this lawyer to read carefully a copy of a letter enclosed, the original of which is addressed to Messrs. Cowart and Kirkpatrick and sent them by this mail, and I should like the lawyer to read my prior letters to you. L. C. Ables has a copy of the agreement under which we started out to do business with the Hagey formulas. I think that copy can be obtained, or a copy made of it, and possibly the original may be found of record. Cowart and Kirkpatrick were authorized to represent me by power-of-attorney only with reference to
326 matters under and in accordance with that agreement. I do not know whether they have violated the agreement or not, or whether they have attempted to make me liable in any way; but I have an indefinite dread that they may do something in this connection prejudicial to my interest, and which may cause me annoyance or loss, and so at all events I am determined to put an end forever to any relations that exist between them and me and whatever loss devolves upon me by reason of so doing I will have to submit to it. I do not accuse C. & K. of dishonesty but I must know where I stand, and whatever interest I may have in the Hagey formulas or in the business connected therewith in common with C. & K. I want to dispose of to them. I will take any reasonable amount that I can get, in cash, and leave that entire- to the discretion of yourself and the lawyer whom you may employ after looking into the matter. If no settlement can be made with them on a cash basis, I will take a joint and several promissory note of Cowart and Kirkpatrick for whatever amount you agree upon with them. I said in my last letter that I would take $13,500., that Miss Lamb would take $2650., and F. B. McStocker $5,000. Get these amounts in cash if possible, or if that shall be impossible, take whatever sums that you think is proper under the circumstances, in cash. I think they would be willing to give some cash, and their notes for the balance. This would be better than nothing. Make the best terms that you can with them under all the circumstances, and we will be satisfied. Do nothing without the consent and advice of the lawyer whom you shall employ in my behalf, and any settlement that said lawyer makes I want to have counter-signed by you. In case C. & K. refuse to settle within twenty-four hours after the demand made by you, and the said lawyer, publish a notice contained in the copy of the letter to C. & K. above mentioned or such modification thereof as my lawyer shall consider proper to protect my interests, signed
327 by myself and Dorothea Lamb, and to prevent any liability of any kind attaching to me, either past or present, if that be possible. Cowart and Kirkpatrick have broken the partnership agreement, if such it may be called existing between us, in several ways. They have not sent monthly settlements; they have prevented Ables from having access to the books and accounts and they have not allowed him to have any voice in the business. They have given

Mr. Wolfenden an interest as I understand, without any authority, and I believe that you will find that they have in many other ways violated the agreement, I believe that they are running upon an entirely different line from what we started out, and under a name which can in no way involve us here. They have sold territory, as I understand, and taken in payment sheep and lands which they had no right to do. They have bought real estate without right or authority, and with money belonging to the business, for that purpose. One thing I must be premptory about, and that is that the alliance, whether it may be a partnership, or otherwise, must cease. I would rather lose every cent that I have there than to have the matter continue.

This letter is entirely confidential and must not be shown to any one, but the attorney or lawyer whom you shall employ, as per instructions herein contained, and of course you will not reveal the contents of it to any one but said lawyer.

If Cowart and Kirkpatrick have violated the agreement in any way, and have become in any way criminally liable, I shall want to be informed of that fact, and I intend on receipt of such information, —instruct you to have them prosecuted to the full extent of the law.

I must rely upon your loyalty to us here. Your mother and sisters are here, and your interests are here, and I know that I
328 can trust you. You have no obligations to Cowart and Kirkpatrick, and I know that you will not sacrifice any interest of your old Island friends, for C. & K. who are almost entirely strangers. I want the lawyer you may engage just to inform me what my rights are, and those of Miss Lamb and Mr. McStocker, and what liabilities if any, we are subjected to.

Give this letter your prompt attention and let me know by return mail exactly what you have done. I do not expect you to work for nothing, you will have reasonable compensation, as I said before, what you ask of me I will pay.

I remain, as ever,

Your friend, J. ALFRED MAGOON.

Mr. Ables tells me that he has placed his interests in the hands of a lawyer by the name of Connolly. If in your judgment this is a proper lawyer to handle our interests, select him.

J. A. M.

What Mr. Magoon has hereinabove stated refers to my interest as well as his.

DOROTHEA LAMB.

The fact that I hold the formula is a great lever which you can hold over C. & K., for if they don't settle with me the formula is as good to me as it is to them and they can do nothing without it.

J. A. M.

329 DEFENDANTS' EXHIBIT "9."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

DEC. 16TH, 1897.

T. E. Cowart and J. H. Kirkpatrick, Hagey Institute, Auckland, N. Z.

FRIENDS COWART AND KIRKPATRICK: Miss Lamb has shown to me the letter which she has written to you and it agrees with my views in this matter so far as it goes.

It is needless for me to attempt to conceal the fact that I am extremely worried over the situation of affairs, and have decided to terminate the relations between us at all costs.

The Hagey Institute which has been formed as I understand has nothing to do with our company which was only for the purpose of establishing and disposing of Institutes and which existed under a different name from that which I see on your bill heads, so I have taken it for granted that the new company is an entirely separate concern.

I believed that you tried to keep me posted as well as you could with reference to my interests until failure to receive by last mail any communication from you, but all that came to me was so indefinite and vague that I could not understand what you were doing. I now must insist upon a termination of our business relations and I shall instruct, by this mail, Mr. R. Dexter unless you settle immediately with me, Miss Lamb and B. F. McStocker, to publish notice in the Auckland papers that you are not authorized in any capacity whatever to represent Miss Lamb or myself or either of us in connection with the Hagey Institute, the Hagey formulas, or any association or company under any name or description whatsoever, formed in connection with the same, either as partners, attorney in fact,
330 or otherwise, and that any partnership that may have existed between us has been dissolved, and that you never had any authority, under any partnership articles or otherwise to create any liability against us or either of us. I shall expect you to make this settlement within twenty-four hours after the receipt of this letter with Mr. Dexter who will be instructed to employ an attorney to represent our interests, or else this notice will be published. In case you make this settlement I shall expect of you to publish a notice that all the business relations heretofore existing between us have been dissolved by mutual consent.

As you know I have the formula here which I have never opened and of which I do not know the contents, upon settlement with us, I will send you this formula sealed up and a guarantee that I do not know the contents of it and that its contents have never been revealed by me to any person.

Hoping that all matters will be immediately arranged without obliging me to sever the relations on my side,

I remain Your friend,

J. ALFRED MAGOON.

331 DEFENDANTS' EXHIBIT "9."

(Indorsed.)

Filed Oct. 30, 1903. M. T. Simonton, Clerk.

DEC. 16TH, 1897.

Messrs. Cowart and Kirkpatrick, Hagey Institute, Auckland, N. Z.

GENTLEMEN: I was very much disappointed in not hearing anything from you by last steamer, after what you had written me in your former letter about taking my interests off my hands, and knowing from a former letter to you that I would be glad to sell out, I hoped to have heard something definite from you last week. Instead of the news that I had expected being received directly from you, I heard through Mr. McStocker, who had the news from L. C. Ables, that the business was not very prosperous, if such be the case I think you certainly should have written either to Mr. Magoon or to myself in order to let one of us know the state of affairs. This was a great surprise to me as from the letters received recently I was quite unprepared for such a statement. I felt not only sorry on our account but also on yours for you must feel the disappointment very keenly. For me it is as you very well know a great loss, as I had had to borrow the money to put in and have been paying interest and hoping all along to get at any rate enough out of the business to repay me for all that, and if I do that, either by selling to some outside person or by having you take my interest off my hands, I shall be satisfied.

As it is I think that now will be a good time to bring the matter to a conclusion and for that reason I would like the Power of Attorney given you by me to be returned to Mr. Magoon, and I hereby cancel the same and request you to return it at the earliest possible opportunity, I do not know that you have been giving any guarantees and it is clearly stated in the Articles of Co-partnership that
332 none such shall be made, I think, however, that it will be best to have a very clear understanding on this point and in case any such have been made I must repudiate such action on your part. Mr. Magoon has been in Court almost ever since the last steamer came in and I have been able to have very little satisfactory conversation with him about the matter, of course he is also much disappointed, I should have been glad to get his advice about the letter but as he is not here to advise me I will say that in case there is any way of doing it I wish to withdraw from the business and have nothing more to do with it as I have already stated and will take the amount of money that I originally put in, namely Twenty-five Hundred Dollars.

You must not think from what I have written that I suppose you have not been working well or doing your best for the work, I feel sure that you have done your utmost, but it was a great disappointment to hear nothing from you by last steamer, and I cannot help thinking from what Ables wrote that it was not an oversight on your

part, and it is not only owing to the fact that I am severing my business relations here, but also partly on that account also that I think it best to take the step above indicated.

Yours truly,

DOROTHEA LAMB.

333 DEFENDANTS' EXHIBIT "10."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

OCTOBER 21ST, 1897.

Mr. Ruby A. Dexter, Auckland, New Zealand.

FRIEND RUBY: I enclose you a rather informal power of attorney. I want you to act for Miss Lamb and myself. The matter is very important and I think you had not better sign any papers without submitting them to an attorney for which of course you will be obliged to pay some fee, make your bargain with the Attorney before hand. I do not expect to pay out much in this way. L. C. Ables and Cowart & Kirkpatrick each have a copy of the partnership articles which of course it will be necessary for you to see before you could sign papers. You ought to confer with Ables and try to settle the difficulties. I want the powers of attorney given by Miss Lamb and myself to Cowart & Kirkpatrick cancelled, I don't care so much about their being returned in case the return of the same is impracticable, but they must be cancelled in your presence.

I want you to be sure and see that all monies to which we are entitled are remitted to us by good Bill of Exchange. I cannot give you specific instructions but must leave matters protected.

Your friend,

J. ALFRED MAGOON.

334 DEFENDANTS' EXHIBIT "11."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

OCT. 21ST, 1897.

Mr. Ruby A. Dexter, Auckland, New Zealand.

MY DEAR DEXTER: We want you jointly in conjunction with T. E. Cowart and J. H. Kirkpatrick to represent us in all matters connected with the Hagey Gold Cure in New Zealand. The act of one is not to be valid or binding without the written approval of all, and all matters done or performed must be strictly within the scope of the partnership agreement in the premises between T. E. Cowart, J. H. Kirkpatrick, Geo. D. Moore, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb. The power of attorney heretofore

given by myself and Miss Lamb to T. E. Cowart and J. H. Kirkpatrick is hereby revoked and is to be rendered up for cancellation.

All monies coming to us or either of us from the Company are to be forwarded to us by Bill of Exchange on Claus Spreckels and Co. or Bishop and Co. in Honolulu.

Yours truly, J. ALFRED MAGOON.

335 In the Circuit Court, c- First Circuit, Territory of Hawaii.

L. 4464, 16/438.

THOMAS M. HARRISON
vs.
J. ALFRED MAGOON ET AL.

Assumpsit.

Clerk's Minutes.

Dated MONDAY, *Nov. 9th,* 1903.

Before Hon. W. J. Robinson, Third Judge.

E. B. McClanahan, for def'ts; A. G. M. Robertson, for Pl't'ff.

Oct. 26 to Nov. 9 Trial.

Nov. 9. Defendant's motion for a non-suit is granted as to all defendants joining in the motion, viz: J. Alfred Magoon, Frank B. McStocker, L. C. Ables and Dorothea Lamb.

Mr. Robertson notes an exception to the ruling of the Court.

The Court discharges the jury.

Mr. Robertson also notes an exception to the discharging of the jury.

(Sg.) M. T. SIMONTON, *Clerk.*

336 (Title of Court and Cause.)

Assumpsit.

Motion for New Trial.

Now comes the plaintiff in the above entitled cause and moves the Court here to order a new trial of said cause on the following grounds:

1. For errors made by the Court in admitting testimony objected to by plaintiff and duly excepted to.
2. For errors made by the Court in excluding testimony offered by plaintiff and duly excepted to.
3. For granting defendants' motion for a non-suit.
4. For discharging the jury duly empannelled and sworn to try said cause.

This motion is based on the record herein and upon the stenographer's notes of testimony taken at the trial herein.

All pleadings, papers and exhibits filed in the cause are hereby made part of this motion.

T. M. HARRISON,
By His Attorneys, ROBERTSON & WILDER.

Dated November 14, 1903.

Endorsed: Filed November 14, 1903. J. A. Thompson, Clerk.

(Title of Court and Cause.)

Clerk's Minutes.

THURSDAY, *Dec.* 31, 1903.

Afternoon Session.

Present: Hon. W. J. Robinson, Third Judge.

(Sg.) M. T. SIMONTON, *Clerk.*

The Court further orders that the plaintiff have twenty (20) days from and after the denial or other disposition of the motion for a new trial herein in which to prepare and present his Bill of Exceptions herein.

Mr. Derby notes an exception.

Exception allowed by the Court.

337 (Title of Court and Cause.)

Order Dismissing Motion for a New Trial.

Plaintiff's Motion for a New Trial in the above cause having come duly on to be heard and the defendants herein having moved in open court to dismiss said motion for a new trial on the grounds (1) that a motion for a new trial was improper in the case of a decision and judgment of non-suit and (2) that no notice of a motion for a new trial was given by plaintiff at the time of the decision and judgment of nonsuit herein; and argument having been duly had in the premises and briefs having been filed and it appearing to the court that said objections of defendants are well taken and that said motion to dismiss should be granted:

Now, therefore, it is hereby ordered and adjudged that Plaintiff's motion for a new trial herein be and the same is hereby dismissed.

Dated Jan. 16th, 1904.

(Sg.) W. J. ROBINSON,
Third Judge of the Circuit Court
of the First Circuit.

Endorsed: Filed Jan. 16th, 1904. George Lucas, Clerk.

(Title of Court and Cause.)

Stipulation.

Defendants in the above entitled cause agree that plaintiff may have twenty days after the completion of the transcript of the testimony herein in which to file, present and perfect his Bill of Exceptions herein, saving, however, all present rights of defendants to insist that the time for filing said Bill of Exceptions has already expired.

January 19, 1904.

(Sg.) KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

Endorsed: Filed Jan. 20, 1904.

338 TERRITORY OF HAWAII:

In the Circuit Court in and for the First Judicial Circuit, September Term, 1903.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON ET ALS., Defendants.

Plaintiff's Bill of Exceptions.

Be it remembered that on the 29th day of October 1903, the foregoing action came on for trial, before the Honorable W. J. Robinson, Third Judge of the said Court, and a jury duly empanelled, examined, accepted and sworn, whereupon the following proceedings were had:—

1. The first witness called on behalf of the Plaintiff was one of the defendants, L. C. Ables, The said witness was examined as to whether George D. Moore was a partner of his in the African, Indian and Pacific Hagey Company, and in answer to the question: "Can you state whether or not George D. Moore received any share of the dividends or profits of the partnership that were divided among the partners?" Answered: "It was receipted for, I don't think by him individually, I think by Mr. Cowert or Kirkpatrick."

Mr. McClanahan, counsel for the Defendants, objected to the said answer as irresponsive to the questions and asked that it be stri-ken out. The Court granted the motion to strike out, to which ruling the plaintiff at the time duly excepted. (See Transcript p. 5.)

2. The said witness was afterwards asked: "And who represented him at Auckland?" answered: "His dividend was receipted if my—
to the best of my memory by either Mr. Cowert or Mr. Kirk-
339 patrick, I wouldn't say who: I have a copy of it in my book."

The said counsel, Mr. McClanahan asked that be stricken out as irresponsive to the question. The Court granted the motion to strike out, to which ruling the Plaintiff at the time duly excepted. (See Transcript, p. 5.)

3. The said witness was afterwards asked: "Without referring to that book Mr. Ables can you state who represented Mr. Moore at Auckland while he was absent?" And answered: "I had no notification or any knowledge from any one only a power of attorney; I don't think that they did but Mr. Cowert or Mr. Wirkpatrick, one or the other, receipted for his dividend."

The said counsel, Mr. McClanahan, said: "I ask that be stricken out as incompetent, irrelevant and immaterial and not responsive to the question, the portion about Mr. Cowart receipting for the dividend." The Court ruled that portion of the answer following the words "I don't think that they did" should be stricken out, to which the Plaintiff at the time duly excepted. (See Transcript, p. 6.)

4. The said witness was afterwards asked: "Will you state those circumstances?" (Referring to the circumstances under which Cowart or Kirkpatrick received money on behalf of the said Moore.) And answered: "As a matter of fact Mr. Cowart received this money or a portion of this money that was dividends; I mean he held the money and stated to me that he had a draft for Mr. Moore and would receipt for his money, either Mr. Cowart or Mr. Kirkpatrick. The witness was then asked: "He had what from Mr. Moore?" And answered: "Either one, a receipt for his dividend, stated to me that they would send the money to him."

The said counsel, Mr. McClanahan asked that the statement of either Cowart or Kirkpatrick be stricken out as hearsay. The Court so ordered, to which at the time the Plaintiff duly excepted.
340 (See transcript, pp. 6, 7.)

5. The said witness was then asked: "Well, did either one or the other purport to have authority to receipt for Moore's dividend?" And answered: "I don't think I questioned the authority, I considered I held the receipt of either one of them and held their receipt for money, and didn't question their authority.

The said counsel, Mr. McClanahan then said: "I object to what the witness considered as an authority. And ask that it be stricken out. The Court so ordered, to which the plaintiff at the time duly excepted. (See Transcript, p. 7.)

6. The said witness was afterwards asked: "Did they have anything to say in regard to the Harrison agreement, did Mr. McStocker have anything to say in regard to the Harrison agreement?" (referring to conversation between Mr. Ables and the other defendants after he returned to Honolulu from Auckland). And answered: "I do not remember that he did." He was then asked: "Or the sheep transaction anything with reference to the sheep transaction at all?" And answered: "I can't call it to mind." He was then asked: "He never returned the dividends, that he received out of the concern did he?"

The said counsel, Mr. McClanahan objected to this as immaterial, The Court sustained this objection, to which the plaintiff at the time duly excepted. (See Transcript, 34, 35.)

7. The said witness was then asked: "You received your share of the dividends that was declared?" And answered: "I did." He was then asked: "And have retained it since?"

The said Mr. McClanahan objected to this as immaterial.

The witness answered: "No it was spent a long time ago." The Court sustained the objection, to which the plaintiff at the time duly excepted. (See Transcript, p. 35.)

341 The said witness was afterwards asked: "With whom was the arrangement for the sale of the New South Wales territory made?"

The said counsel, Mr. McClanahan objected to this question as immaterial. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See Transcript, p. 47, 48.)

Thereafter and in the cross examination of the said defendant, L. C. Ables, counsel for the Defendant asked the following questions, to which objections were raised, by the plaintiff and overruled, to which at the time exceptions were duly taken by the plaintiff.

9. The said witness was asked: "At or about the time of this contract did you know or learn the market value of those sheep or the value of them?" Counsel for the plaintiff objected to this question as irrelevant and immaterial. The Court overruled the objection, to which the plaintiff at the time duly excepted. (See Transcript, p. 53.)

10. The said witness was afterwards asked: "Settling the amount?" (Referring to whether or not he took part in arranging what amount of money should be raised by the Tasmania partnership for starting its business in that colony.) And answered: "Nothing to do with it." The counsel for the plaintiff objected to that as incompetent, irrelevant and immaterial and moved to strike the answer out. The Court denied the motion, to which the plaintiff at the time duly excepted. (See Transcript, p. 58.)

11. The said witness was afterwards asked: "What portion of the 4500 pounds did you receive, actually handling the money?" (Referring to money received from a sale of Hagey rights in New South Wales.) The counsel for the plaintiff objected to the question as irrelevant and immaterial. The Court overruled the objections, to which the plaintiff at the time duly excepted. (See Tran-

342 script, p. 69.)

12. The said witness was afterwards asked: "The contract you signed then was a contract which required Harrison to give it a trial for six months?" (Referring to the contract on which this action is brought.) The counsel for the Plaintiff objected to the question on the ground it was not the best evidence, and moved to strike it out. The Court denied the motion, to which the Plaintiff at the time duly excepted. (See transcript, p. 62.)

13. The said witness was afterwards asked: "Is this, Mr. Ables, one of the letters written by you to Mr. McStocker before you left New Zealand?" And answered: "It looks like, may be two or three. This is my writing, this is all my writing." He was then asked: "Answer the question?" And answered: "Yes." He was then asked: "It that your letter?" And said: "Yes, sir." He was then asked: "One of the letters you wrote to McStocker before you left New Zealand?" And said: "Those are all my letters." He was then asked: "What is that?" And said: "That is my letter." He

was then asked: "To McStocker before you left New Zealand?" And said: "To McStocker." Mr. McClanahan, the counsel for the defendants then said "We offer this in evidence if the Court please for the same purpose that we offered Exhibits 1 and 2." The counsel for the Plaintiff objected to the letter on the ground that it was hearsay. The Court overruled the objection, to which the plaintiff at the time duly excepted. The court ordered that the last mentioned letter be marked Exhibit "3." (See transcript, p. 69.)

14. The counsel for the plaintiff then objected to the portions of said Exhibit "3" that were the letters dated August 31st and October 1st in that they were irrelevant and immaterial and improper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. (See Transcript, p. 70.)

343 15. The said witness was then asked. "Will you please to tell me if that is a letter that you wrote to Mr. McStocker prior to your leaving New Zealand with reference to the partnership business?" And answered: "Yes, sir, that is my letter, dated the 26th November." Mr. McClanahan then offered the letter in evidence. The counsel for the plaintiff objected to the evidence on the ground that it was irrelevant and immaterial, and hearsay, because a communication between Ables and McStocker, and not proper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. The Court then ordered the letter which accompanied a trial balance marked Exhibit "4." (See Transcript p. 69, 70.)

16. The counsel for the plaintiff offered a further objection to the reading of the last mentioned letter on the ground that the trial balance, was a thing as wholly complete in itself and was no part of the letter, that by itself it was wholly complete; that — the trial balance was admissible it did not make the letter admissible, The Court overruled the objection, to which the plaintiff at the time duly excepted. (See Transcript, P. 70.)

Thereafter and in the Re-Direct Examination of the said Defendant, L. C. Ables, counsel for the plaintiff asked the following questions, to which objections were raised, sustained, and exceptions duly taken at the time by the said plaintiff.

17. The said witness was asked: "You have stated that on arriving in Honolulu you did not talk to your copartners about the Harrison agreement because it was closed; did any of your partners refer —did any of your partners refer to the Harrison agreement?"

Mr. McClanahan, the counsel for the defendants, objected to this as improper re-direct examination. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript. p. 77.)

The next witness called on behalf of the plaintiff was one
344 of the defendants, Mrs. Dorathea Emerson, who after her direct examination was cross examined by counsel for the defendants and the following questions asked, to which objections were raised by the plaintiff and overruled, to which at the time exceptions were duly taken by the plaintiff.

18. The said witness was asked: "I call your attention to a sen-

tence in the letter marked Plaintiff's Exhibit "K" reading: 'The letters written to Dexter were calculated to do us great harm.' I will asked you if these are carbon copies of those letters?" The counsel for the plaintiff objected to this as irrelevant and immaterial. The counsel for the defendants then said: "Not carbon copies; I meant letter press copies." The counsel for the plaintiff objected to this as irrelevant and immaterial. The Court overruled the objection, to which at the time the plaintiff duly excepted. (See Transcript p. 88.)

19. The witness was then asked: "Here is another one?" And answered: "These two are certainly letters to Dexter that I remember. I am just looking through this one." The counsel for the defendants then said: "We offer in evidence letter identified by the witness as a typewritten copy of a letter sent to the Dexter referred to in the letter Plaintiff's Exhibit "K" dated September 23rd 1897, addressed to Ruby A. Dexter, Auckland, New Zealand, and signed J. Alfred Magoon and I think it is Dorothea Lamb, yes, Dorothea Lamb." The counsel for the plaintiff objected to the letter on the ground that it was irrelevant and improper it having no relation to any controversy involved in this case, but belonging to matters that were disconnected wholly from this case, on the ground that it was hearsay being a communication between certain defendants in this case and one by the name of Ruby Dexter entirely hearsay as to the plaintiff, he not being a party to it in any way, and it not being brought to his attention in any way. And third, that it was not proper cross examination. The Court overruled the objection,
345 to which the plaintiff at the time duly excepted. The Court then ordered that the letter just offered be received and marked Defendant's Exhibit "5" (See transcript, pp. 88, 89.)

20. The counsel for the Defendants then offered in evidence letter dated September 23rd, 1897, addressed to Ruby Dexter, care Dexter and Crozier, Auckland, New Zealand, signed J. Alfred Magoon, and identified by the witness as being one of the letters referred to in Plaintiff's Exhibit "K." The counsel for the plaintiff objected to the letter being received in evidence on the ground that it was irrelevant and immaterial, in as much as it bore in no way upon any issue *in* involved in this case. Secondly, that it was hearsay as to the plaintiff inasmuch as it was correspondence between one of the defendants and a third party wholly disconnected from any partnership or other transaction in this case; also that it was not proper cross examination. The Court overruled the objection to which the plaintiff at the time duly excepted. The Court ordered that the letter be received in evidence and marked Defendants' Exhibit "6." (See transcript, pp. 89, 90.)

21. The counsel for the defendants then said: "We offer in evidence letter dater September 27th, 1897, addressed to Cowart and Kirkpatrick, signed J. Alfred Magoon and identified by the witness as being an enclosure of the letter just read and offered in evidence and received in evidence." The Court then said: "The letter last read being defendant's Exhibit "6." The Counsel for the plaintiff objected to the admission of this in evidence on the ground that it was irrelevant and inasmuch as it had no bearing upon any issue involved in this case, "as hearsay as to this plaintiff, being a communication

between two persons, for which he had no knowledge and could be in no wise binding upon him; and further that it was not proper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. The Court ordered that
346 the instrument offered and then read in evidence be received and marked Defendants' Exhibit "7." (See transcript, p. 89.)

23. The counsel for the Defendants asked the witness: "Can you identify this as copies of letters stated to have been enclosed in that letter to Ruby Dexter?" Who answered: "Did you asked me if this was enclosed too?"

The witness was then asked: "If you can identify that as the copy of the letter to Cowart and Kirkpatrick which is stated to have been enclosed in a letter which I have just read, to Mr. Dexter?" And answered: "What was the date of that letter?" The counsel for the defendants said "December 16th." The witness replied: "Yes, sir, I can." The counsel for the Defendants then said: "We offer in evidence letter dated December 16th, addressed to—both of them addressed to Messrs.—one addressed to Messrs. Cowart and Kirkpatrick, Hagey Institute, Auckland, New Zealand, and the other to T. E. Cowart and J. H. Kirkpatrick, Hagey Institute, Auckland, New Zealand, signed by J. Alfred Magoon—no, I guess I am mistaken—one is signed by him." The counsel for the plaintiff then objected to the admission of these letters offered in evidence on the ground that they were irrelevant and immaterial and had no bearing upon any issue in this case, and hearsay so far as the plaintiff was concerned; and not proper cross examination. The Court then said: "These are the enclosures alluded to in the letters last read?" The counsel for the Defendants answered: "They are." The Court then overruled the objection, to which the Plaintiff at the time duly excepted. The Court ordered the letters to be received in evidence and marked Defendants' Exhibit "9." (See transcript, pp. 91, 92.)

24. The counsel for defendants afterwards said: "I offer in evidence copy of letter dated October 21st, 1897, addressed to Ruby Dexter, signed J. Alfred Magoon and identified by the witness
347 as being one of the letters referred to in Plaintiff's Exhibit "K." The counsel for the Plaintiff objected to the letter being received in evidence as being irrelevant and immaterial and having no bearing upon any issue in this case, hearsay as far as this plaintiff was concerned and not proper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. The Court order- the letter to be received in evidence and marked Defendants' Exhibit "10". (See transcript, pp. 92, 93.)

25. The counsel for the Defendants afterwards said: "I offer in evidence copy of letter dated October 31st, 1897, addressed to Mr. Ruby A. Dexter and signed J. Alfred Magoon and Dorothea Lamb and identified by the witness as being a letter referred to, written to Dexter, in Plaintiff's Exhibit "K". The Court ordered it to be received in evidence and marked Defendants' Exhibit "11". The counsel for the Plaintiff objected to this being received in evidence. The Court set aside the order until the objection was heard. The counsel for the Plaintiff said: "It is irrelevant and immaterial and it doesn't

relate to any issue in this case. It is hearsay as far as this Plaintiff is concerned and not proper cross examination. The Court overruled the objection, to which the Plaintiff at the time duly excepted. (See transcript, p. 93.)

Thereafter in the re-direct examination of the said witness, the counsel for the Plaintiff asked the following questions to which objections were raised, sustained, and exceptions duly taken.

26. The said witness was asked: "When did you think this sheep transaction was entered into with?" The counsel for the defendants' objected to the question. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See transcript, p. 95.)

348 Thereafter in Re-Cross Examination of the said witness the following questions were asked by counsel for the Defendants; to which objections were raised and overruled, to which the plaintiff at the time duly excepted.

27. The said witness was asked: "Mrs. Emerson you say that those letters were the steps taken by you in the sheep matter; didn't you take another step in connection with Mr. Magoon to send some one down there?" The counsel for the plaintiff objected to this as irrelevant and immaterial and not proper re-cross examination. The Court overruled the objection, to which the Plaintiff at the time duly excepted. (See transcript, P. 97.)

28. The witness was afterwards asked: "Did you not send some one down there or make arrangements to send some one down there to represent you, to cancel and straighten out matters, a man named Good?" The counsel for the plaintiff objected to this as irrelevant and immaterial and hearsay. The Court over-uled the objection to which the Plaintiff at the time duly excepted. (See transcript pp. 97, 98.)

Thereafter the first witness, Mr. L. C. Ables was recalled for further direct examination, and asked the following questions, to which objections were raised, sustained, and exceptions duly taken at the time by the Plaintiff.

29. The witness was asked: "Did you account for it in your evidence on the last trial?" (Referring to a discrepancy in the testimony of the witness between what was given at this trial and that given at the trial before, concerning the date of Moore's departure from New Zealand.) The counsel for the defendants objected to the question as an effort to impeach the witness. The Court sustained the objection to which the Plaintiff at the time duly excepted. (See transcript p. 101.)

349 Thereafter the counsel for the plaintiff read the deposition of Alfred Edward Gilmore, to which the following objections were raised, sustained, and exceptions at the time duly taken by the Plaintiff.

30. On the answer to question 34 being read Mr. McClanahan, counsel for the defendants, made the following motion: "I ask that that be stricken out because it is based on the answer which has been stricken out. The Court ordered it stricken out, to which the Plaintiff at the time duly excepted. (See transcript, p. 102.)

31. After question 35, and answer to wit. "Did you mention the

matter to Harrison?" "Yes, Sir." were read, the counsel for the defendants objected to that and asked that it be stricken out. The Court so ordered, to which at the time the plaintiff duly excepted. (See transcript, p. 102.)

32. After question 36, and answer, to wit: "If so when?" "On several occasions" were read, the counsel for the defendants objected to it and asked that it be stricken out. The Court granted the motion, to which the plaintiff at the time duly excepted. (See transcript, pp. 102, 103.)

33. The counsel for the defendants objected to question 52 as being immaterial. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript p. 103.)

34. The counsel for the Defendants objected to question 53 as immaterial. The Court sustained the objection, to which the Plaintiff duly excepted. (See transcript, p. 103.)

35. The counsel for the Defendants objected to question 54 as being immaterial and based on the last question dissallowed, which was the said question 53. The Court sustained the objection to which the Plaintiff at the time duly excepted. (See transcript, p. 103.)

350 36. The counsel for the defendants objected to question 56 as calling for the conclusion of the witness. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See Transcript, p. 103.)

37. The counsel for the defendants objected to question 57 as immaterial and calling for the conclusion of the witness. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See transcript, p. 103.)

38. The counsel for the Defendants objected to question 58 as being based on the question that had been ruled out. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See transcript, 103.)

39. The counsel for the Defendants objected to question 59 as immaterial. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (pp. 103, 104.)

Thereafter the Plaintiff, T. M. Harrison, was called as witness on his own behalf, and was asked by his counsel the following question, to which objections were raised, sustained, and exceptions at the time duly taken by the Plaintiff as appears below:

40. The said witness was asked: "State whether or not you became dissatisfied with the business by reason of these written instructions?" (Referring to instructions for conducting the Hagey Cure.) Ultimately the witness answered: "I was dissatisfied." The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See transcript, pp. 112, 113.)

41. The said witness was asked: "Tell us in further detail if you can what you did with reference to the business in Hobart?" And answered: "We didn't succeed in getting any patients, and there was some trouble arose between Gilmore and I and O'Brien, we
351 believed that he was holding patients back from certain things he said." The counsel for the Defendants asked that the

conclusion and reason be stricken —. The Court ordered that all the words following "We believed" be stricken out, to which the Plaintiff at the time duly excepted. (See transcript, p. 117.)

42. The said witness was asked: "Did you leave anything undone that you might have done to make the Institute a success?" And answered: "No, I was very anxious—"The counsel for the Defendants objected to this as incompetent, irrelevant and immaterial. The Court sustained the objection to which the Plaintiff at the time duly excepted. (See transcript, pp. 118, 119.)

43. The witness was then asked: "Did you fail to do anything that was usually done in connection with starting a Hagey Institute?" The counsel for the Defendants here said: "Same objections. Calling for the opinion of the witness. "The Court sustained the objection, to which at the time the Plaintiff duly excepted. (See transcript, p. 119.)

44. The witness was afterwards asked: "From when to when?" (Referring to the period the Hagey Institute at Hobart was kept open by him.) And answered: "From the 1st of February to the 1st of March. I was very much afraid of being accused of bad faith and I did my utmost to get the institute started." "The counsel for the defendants asked that it be stricken out as irresponsive. The Court ordered it to be stricken out from the words "I was very much afraid," to which the Plaintiff at the time duly excepted. (See transcript, p. 119.)

45. The witness was afterwards asked: "Was it possible to continue the Institute any longer?" The counsel for the defendants objected to that as calling for the opinion of the witness. The Court sustained the objection, to which the plaintiff at the time duly excepted.
352 (See transcript, p. 120.)

46. The witness was then asked: "Could you carry on the business any longer?" Counsel for the defendants objected to this on the same grounds. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 121.)

47. The witness was then asked: "Could the business have been maintained any longer?" The counsel for the defendants, objected to this on the same grounds. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript p. 121.)

48. The witness was afterwards asked: "Under what provision in the contract, if any, did you make this demand on Cowart or Kirkpatrick?" And answered: "Under clause "4." The counsel for the defendants objected, because the contract spoke for itself. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 123.)

49. The witness was afterwards asked: "In what capacity did you make demand upon him?" (Referring to Kirkpatrick.) The counsel for the defendants objected to this as immaterial and calling for the conclusion of the witness. The Court sustained the objection to which the plaintiff at the time duly excepted. (See transcript, p. 124.)

50. The witness was afterwards asked: "Did you know where he

was?" The counsel for the defendant objected to this as immaterial. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 125.)

51. The witness was afterwards asked: "What was the value of the sheep run and sheep that you turned over to the company as the consideration on your part for this agreement?" The counsel
353 for the defendants objected to the question on the ground that the witness was not shown to be qualified to testify as to the value. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 127.)

Thereafter in the Re-Direct examination of the said plaintiff, T. M. Harrison, the counsel for the plaintiff asked the following question, to which objections were raised, sustained, and exceptions taken as below stated:

Thereafter in the Re-Cross examination of the said plaintiff, T. M. Harrison, the counsel for the defendants asked the following question, which was objected to and the objections overruled, to which the plaintiff at the time duly excepted, as below:

53. The said witness was asked: "Was not Robinson indebted to you, after you bought in he became indebted to you?" And answered: "Yes." He was then asked: "Why and how?" and the counsel for the plaintiff objected to this as not proper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 184.)

54. Thereafter the counsel for the defendants moved the Court as follows: "If the Court please, we move for judgment of nonsuit on the defendant Magoon on the ground that there has been shown no notice of dissatisfaction as required by the contract and no demand; on the ground that the contract is unauthorized; on the ground that there has been shown no ratification on the ground that the evidence clearly shows that the dissatisfaction arose before the plaintiff entered into the conduct of the business and was therefore not *bona fida*; on the ground that there was no consideration for the contract sued on; on the ground that there was shown in the evidence a judgment in the New Zealand Court that remains unsatified and that it bars this action.

354 We make the same motion on the same grounds for the defendant Emerson.

We make the same motion on the same grounds for the defendant McStocker.

For the defendant Magoon we further move for a nonsuit on the following grounds viewing the contract as joint and several:

First. Because the contract is beyond the scope of the partnership business and unauthorized:

Second. Because there has been no ratification shown within the rules of law as a ratification of an unauthorized contract:

Third. Even if ratification of some of the parties be shown, there is no ratification on the part of all, and as a contract could not be authorized by less than all, it cannot be ratified by less than all:

Fourth. On the ground that judgment has been had against some

of the joint contractors that bars this suit against all or against the remaining ones:

Fifth. The contract is without consideration, the contract sued on:

Sixth. There is no signature of the firm to the contract sued on because all the members of the partnership did not sign.

Seventh. There is no proof of any *bona fida* dissatisfaction on the part of Harrison:

Eighth. There is no proof of any notice of any dissatisfaction to or demand on the defendant Magoon or the defendant McStocker or defendant Emerson, or any of them:

We make this motion on the same grounds viewing the contract as joint for the defendant Emerson and the defendant McStocker.

Viewing the contract as a several contract we move on behalf
355 of defendant Magoon for a nonsuit on the ground that no authority is shown to bind Magoon, McStocker or Emerson or any of them:

Second. That no ratification has been shown by them or any of them:

Third. That no proof of any *bona fide* dissatisfaction on the part of Harrison has been shown:

Fourth. That there is no proof of notice to or demand on Magoon, McStocker or Emerson or any of them, and it is necessary to give notice and make demand on each.

Fifth. On the ground that no consideration passed to the several obligors.

We make the same motion on behalf of the defendant Emerson, on the same grounds, and on behalf of the defendant McStocker on the same grounds.

We move for a nonsuit on behalf of defendant Ables:

First. On the ground that there is no contract by Ables with the others and intent on either his part or Harrison that he should be bound if the others were not:

Second. The form of the action is unsuited to the plaintiff's claim since Ables cannot be bound severally on the contract:

Third. The contract was made by the Company and cannot bind Ables individually:

Fourth. If it be held that the contract can bind Ables individually it is a several contract, and there is no proof furnished of any notice of dissatisfaction to Ables and consequently no demand upon Ables:

Fifth. If assuming a contract to be held to be a joint on- on the part of Ables and certain of the other defendants, the New Zealand judgment bars this action against Ables:

Sixth. There is no proof of any *bona fide* dissatisfaction
356 on the part of Harrison:

Seventh. There is a misjoinder of parties defendant:

Eighth. There is no consideration passing to Ables:

Ninth. The New Zealand judgment bars this action against Ables.

The Court granted the motion for non-suit, as to the defendants Magoon, McStocker, Emerson and Ables, to which the Plaintiff at the time duly excepted. (See transcript pp. 187, 188, 189, 190.)

55. Thereafter on the 9th day of November, 1903, the Court address the jury as follows: "Gentlemen, at this stage of the case the Court having determined that the plaintiff cannot maintain this action as against the defendants, which have been served or who have appeared in this action, and who are now represented in Court, there is nothing in this case to be left to the determination of the jury. You are therefore discharged with the thanks of this Court for your service in this cause." Upon this happening, the Plaintiff at the time duly noted an exception to the discharge of the jury. (See Transcript, p. 190.)

56. That thereafter on the 14th day of November 1903, the Plaintiff in the above entitled case filed his motion for a new trial, which was in the words following, to wit:

357 In the Circuit Court of the First Circuit, Territory of Hawaii, September Term, 1903.

T. M. HARRISON
vs.
J. A. MAGOON ET ALS.

Assumpsit.

Motion for New Trial.

Now comes the Plaintiff in the above entitled cause and moves the Court here to order a new trial of said cause on the following grounds:

1. For errors made by the Court in admitting testimony objected to by Plaintiff and duly excepted to.
2. For errors made by the Court in excluding testimony offered by Plaintiff and duly excepted to.
3. For granting defendants' motion for a non-suit.
4. For discharging the jury duly empannelled and sworn to try said cause.

This motion is based on the record herein and upon the stenographer's notes of testimony taken at the trial herein.

All pleadings, papers and exhibits filed in the cause are hereby made part of this motion.

T. M. HARRISON,
(Sg.) By His Attorneys, ROBERTSON & WILDER.

Dated November 14th, 1903.

That said Motion for a New Trial came regularly for hearing on the 31st day of December 1903, and was from time to time adjourned for further hearing until the 16th day of January 1904, when it was overruled by the Court, as follows, to wit:

358 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

T. M. HARRISON, Plaintiff,
vs.
J. A. MAGOON ET ALS., Defendants.

Assumpsit.

Order Dismissing Motion for a New Trial.

Plaintiff's Motion for a New Trial in the above cause having come duly on to be heard and the defendants herein having moved in open court to dismiss said motion for a new trial on the grounds (1) that a motion for a new trial was improper in the case of a discision and judgment of non-suit and (2) that no notice of a motion for a new trial was given by plaintiff at the time of the decision and judgment of nonsuit herein: and argument having been duly had in the premises and briefs having been filed and it appearsing to the court that said objections of defendants are well taken and that said motion to dismiss should be granted:

Now, therefore, it is hereby ordered and adjudged that Plaintiff's motion for a new trial herein be and the same is hereby dismissed.

Dated, Jan. 16th, 1904.

(Sg.) W. J. ROBINSON.
Third Judge of the Circuit Court of the First Circuit.

To the said order dismissing motion for a new trial, the Plaintiff at the time duly excepted.

359 It is hereby certified that the papers referred to, in the Official Stenographer's shorthand transcript of testimony given in this action, on page 87 thereof, as ordered by the Court to be received in evidence and marked Plaintiff's Exhibit "M," are the same papers referred to at two other places in the said transcript, to wit:

1. At pages 40 and 41 thereof in the following question and answer, to wit: "Q. Please examine this? A. This looks like the paper but I think Mott-Smith as attorney had something to do with it, I think his name is on the paper; this looks like it.

2. At page 186 thereof in the following admission, to wit: "Mr. Robertson: I understand that it is admitted on the part of the defendants that Mr. Magoon and Mr. Ables and Mr. McStocker as well as Mrs. Emerson, was served by Mr. Mott-Smith with a copy of this New Zealand Summons on or about 23rd of July 1898. Is that so Mr. McClanahan?

All records, pleadings, motions, affidavits, exhibits, instructions to the jury, clerk's minutes and the official stenographer's shorthand transcript of testimony had in said case, and each and every paper on file in said case, are hereby made a part of this Bill of Exceptions.

(Sg.) ROBERTSON & WILDER,
Attorneys for the Plaintiff.

The foregoing Bill of Exceptions being found conformable to the truth is hereby allowed, and I hereby certify that the record contains all the pleadings, exhibits and testimony necessary for a proper consideration of said case in the Supreme Court.

(Sg.) W. B. ROBINSON,
Third Judge, First Circuit, Territory of Hawaii.

Dated, Honolulu, H. T. 20th August A. D. 1904.

Endorsed: Filed and presented for allowance Aug. 6, 1904 at 10.58 A. M. George Lucas, Clerk.

360 In the Supreme Court of the Territory of Hawaii.

THOMAS M. HARRISON
vs.
J. A. MAGOON ET AL.

Motion to Strike Cause from Calendar and Dismiss Exceptions.

Now come the defendants herein, by their attorneys Kinney, McClanahan & Cooper and move this Honorable Court that the above cause be stricken from the calendar and that plaintiff's bill of exceptions herein be dismissed and for such other relief as to this Court may seem appropriate.

This motion is based on the record and upon the following grounds:

1. That the aforesaid bill of exceptions of the plaintiff herein was not filed within the time allowed by law.
2. That no exception lies to the order herein dismissing plaintiff's motion for a new trial.
3. That no motion for a new trial lies after an order and judgment of nonsuit.
4. That no notice of a motion for a new trial was given at the time that the order of nonsuit was made in the above cause nor at any proper time.

Dated Honolulu, September 2nd, A. D. 1904.

KINNEY, McCLANAHAN & COOPER,
Attorneys for the Defendants.

Endorsed and Filed, September 2, 1904.

361 Supreme Court of the Territory of Hawaii, October Term, 1904.

T. M. HARRISON
vs.
J. A. MAGOON ET AL.

HONOLULU, *Monday, October 3rd,* 1904.

Clerk's Minutes.

Exceptions from Circuit Court 1st Circuit.
Motion to Dismiss.
Before Frear C. J. Hartwell and Hatch JJ.
Robertson and Wilder appeared for the Plaintiff and Kinney McClanahan & Cooper, S. H. Derby Magoon & Lightfoot for the Defendant-
Mr. Derby reads a motion to dismiss Bill of Exceptions and argues.
Mr. Magoon argues.
Mr. Robertson argues.
Mr. Harrison argues.
Mr. Derby replies.
The Court takes the matter under consideration.

362 THOMAS M. HARRISON
v.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON.

Exceptions from Circuit Court, First Circuit.

Argued October 3, 1904. Decided October 31, 1904.

Frear, C. J., Hartwell and Hatch, JJ.

BILL OF EXCEPTIONS—*extension of time for.*—Under C. L. Sec. 1438, as amended by Laws of 1903, Act 32, Sec. 18, an extension of time in which to file a bill of exceptions must be allowed before the expiration of the twenty days allowed by statute or the extended time previously allowed by the judge under the statute.

ID.—*time for, in case of motion for new trial.*—The date when such twenty days begins in the case of an exception to a ruling on a motion for a new trial is the date of such ruling and not the date of the judgment entered in the case before the motion was made.

EXCEPTION—*to dismissal of motion for new trial.*—An exception lies to a dismissal, as distinguished from a denial or overruling, of a motion for a new trial. The remedy, if any, by mandamus, is not exclusive.

MOTION—*for new trial proper in case of involuntary nonsuit.*—A motion for a new trial lies for errors committed during the trial, including an error in ordering a nonsuit, although the exceptions to the rulings alleged to be erroneous
363 may be brought directly to this court by bill of exceptions, without first being made the basis of a motion for a new trial.

MOTION FOR NEW TRIAL—*notice of.*—C. L. Secs. 1462, 1463, do not make the right to move for a new trial on grounds other than that the verdict is contrary to the law and the evidence, conditional upon giving notice of the motion at the time of rendering the verdict or judgment.

Opinion of the Court by FREAR, *C. J.*:

The only question presented in this case is whether the defendant's motion to strike the cause from the calendar and dismiss the plaintiff's bill of exceptions should be granted. The circumstances are these: On November 9, 1903, at the close of the trial in the circuit court, a nonsuit was ordered on defendants' motion. On November 12, 1903, judgment was entered. On November 14, 1903, a motion for a new trial was filed based on four grounds, namely, errors in admitting testimony, errors in excluding testimony, error in granting defendants' motion for a nonsuit, and error in discharging the jury. On December 31, 1903, time for filing a bill of exceptions was extended until ten days after the disposition of the motion for a new trial. On January 15, 1904, the motion for a new trial was dismissed, and the time for filing a bill of exceptions was further extended until twenty days after completion of the transcript. The bill of exceptions was filed August 6, 1904, within the time allowed.

The grounds of the motion to dismiss the bill of exceptions will be considered in their order.

1. That the bill of exceptions was not filed within the time allowed by law. The statute (C. L., Sec. 1438, as amended by Laws of 1903, Act 32, Sec. 18,) requires the exceptions to be incorporated in a bill of exceptions and presented to the judge "within twenty days after final judgment or such further time as may be allowed by the judge." It is obvious that this provision was not complied with, if the date of the final judgment must be considered as November 12, 1903, the day on which judgment
364 was entered; for an allowance of further time, when made after the expiration of the twenty days after judgment or the extended time, if any, properly allowed previously, is ineffectual. Kapiolani Est., Ltd., *v.* Peck, 14 Haw. 580.

It will be unnecessary to decide at present whether the filing of the motion for a new trial suspended the judgment until the disposition of the motion, so as to allow the fifty-five exceptions, including the exception to the order of nonsuit, which were taken during the trial and before the entry of judgment, to be incorporated in a bill of exceptions and presented to the judge within twenty days or further granted time thereafter; for, if the remaining exception,

namely, that to the dismissal of the motion for a new trial, was properly incorporated in the bill and presented to the judge within the time allowed by law, the bill of exceptions can not be dismissed. In our opinion, that exception was incorporated in the bill and presented within the time allowed by law.

The section of the statute above cited, construed in connection with Sec. 1436 of the Civil Laws, permits exceptions taken in any "proceeding," as well as in any "trial" before a circuit court, to be incorporated in a bill of exceptions within the time limited. In the nature of things an exception could not be taken to the dismissal of a motion for a new trial within twenty days after judgment, when such dismissal was not made until after that time, and it would hardly be expected that a party should be obliged to obtain an extension of time before the ruling excepted to is made. If the motion for a new trial was properly made and ruled upon, an exception would, by the terms of the statute, lie to the ruling whenever it was made. Under the circumstances the reasonable view would seem to be to consider the motion for a new trial as a "proceeding," and not as a part of the "trial," and the judgment in that proceeding as the decision therein, rather than the judgment entered previously after the trial and before the motion for a new trial was filed. In that view the bill of exceptions, in so far as the exception to the dismissal of the motion for a new trial is concerned, was made up and presented to the judge within the time limited, for the
365 extension of time was obtained within twenty days after the decision upon that motion.

2. That no exception lies to an order dismissing a motion for a new trial,—the contention being that mandamus to compel the judge to rule upon the motion, and not an exception to a dismissal of the motion, is the proper remedy where, as in this instance, the motion was dismissed and not overruled. It seems to us that whether mandamus would lie or not, an exception does lie; for the dismissal of the motion was an opinion, ruling or order within the meaning of the first portion of the section of the statute first above referred to, which provides that "a party may allege exceptions to any such opinion, direction, instruction, ruling or order," that is, "in any trial or other proceeding before a circuit court * * * in any matter of law," as shown by the preceding two sections in the Civil Laws.

3. That no motion for a new trial lies after an order or judgment of nonsuit. This ground also can not be sustained. In the absence of statute a motion for a new trial would lie in such a case, and generally elsewhere as well as here motions for new trials have been based upon rulings made and excepted to during the trial, as well as upon the ground that the verdict was contrary to the law and the evidence or upon the grounds of newly discovered evidence, misconduct of the jury, and the like. The ruling upon the motion for a nonsuit was such a ruling made during the trial. The mere fact that an exception to an order of nonsuit may be incorporated in a bill of exceptions and brought directly to this court, without first being made the basis of a motion for a new trial, does not prevent

its being made the basis of a motion for a new trial. That is true also of other exceptions taken during the trial. It may usually be preferable to bring such exceptions directly to this court, but that method is not exclusive.

4. That no notice of a motion for a new trial was given at the time that the order of nonsuit was made. If such notice was necessary, it must have been by reason of some statutory provision. The rule of the circuit courts, adopted in 1893, if it
366 is still in force, required merely that notice of a motion for a new trial based on the ground that the verdict was contrary to the law and the evidence should be made at the time of the rendition of the verdict and before the jury was discharged. That has no application to a motion for a new trial based on errors of law committed by the trial judge during the course of a trial.

The statutory provisions that bear upon this question are those set forth in Secs. 1462 and 1463 of the Civil Laws, which read as follows:

"SEC. 1462. Judgment shall be entered by the clerk, without motion, immediately upon the rendition of a verdict, or of a judgment of the court in banco, or of a judge at chambers, and execution may issue thereon at any time thereafter, when called for, unless notice is given at the time of rendering the verdict or judgment, of a motion for a new trial and the filing of a bill of exceptions and bond, as provided by statute, within ten days after the rendition of such verdict or judgment: provided, that execution may issue within ten days, even though such notice be given, when good and sufficient cause can be shown therefor. The provisions of this section shall not affect the right of appeal."

"SEC. 1463. Any party against whom a verdict or judgment is rendered, as set forth in the last preceding section, may, upon filing a sufficient bond of security, conditioned for the payment of all costs of motion in case he fail to sustain the same, and that he will not to the detriment of the plaintiff in the action, remove or otherwise dispose of any property he may have liable to execution on such judgment, and upon giving notice of said motion and the grounds thereof to the opposite party, move the court at any time within ten days after rendition of verdict or judgment, for a new trial, for any cause for which by law a new trial may and ought to be granted. The filing of the bill of exceptions and bond shall operate as a stay of execution, until the motion is determined."

If these sections are taken just as they stand, they have no application to the present case, for a judgment of nonsuit by a circuit court presided over by one judge is not "a verdict, or a judgment of the court in banco, or of a judge at chambers." In such
367 case there would be no statutory limitation of time within which to give notice of a motion for a new trial, or even within which to make the motion; but in our opinion the words "in banco" have been repealed by implication by acts which have wrought sweeping changes in the Hawaiian judiciary since the enactment of these sections as Secs. 1155 and 1156 of the Civil Code of 1859, which were taken with extensive modifications from the Act of 1847,

organizing the judiciary department. There is no longer a circuit court in banco or a Supreme Court sitting in banco for the trial of cases at *nisi prius*. The circuit courts take the place in general of the former supreme court at *nisi prius*. See Republic *v.* Tokuji, 9 Haw. 548, 550.

With the words "in banco" omitted, these sections apply to the present case, unless, indeed, they are confined in their operation to motions for new trials when made by defendants, in which case also there would be no statutory limitation of the time within which notice of a motion for a new trial would have to be given or within which the motion would have to be made by the plaintiff in this case. But there does not seem to be adequate reason for holding that these sections apply to defendants alone. There is no reason why they should be so limited and we believe it has not generally been supposed that they were. Their language, it is true, is framed to some extent as if motions by defendants were particularly in mind, but that was not unnatural, considering that defendants are usually the ones who make such motions. The fact that one of the conditions required in the bond by the second of these sections is that the moving party will not to the "detriment of the plaintiff" remove or dispose of his property does not by necessary implication limit the operation of the section to motions by defendants. That condition is required only when it is applicable. Not being applicable to a plaintiff, it is not required of him. It, indeed, does not apply even to defendants when it is not applicable to them, as in the case of a judgment against a defendant in ejectment for possession without damages. This has already been held. Kaheana *v.* Nalimu, 8 Haw. 227, Kaniku *v.* Monsarrat, *id.* 229. See also The
368 Queen *v.* Gay, *id.* 468, for somewhat similar reasoning under a different statute.

But do these sections, if applicable, require notice of a motion for a new trial to be given at the time of rendering a judgment of nonsuit? It must be confessed that they present several questions of difficulty, and they seem to be much in need of amendment, but taken together they do not, in our opinion, require notice of a motion for a new trial to be given at the time of rendering a judgment of nonsuit. The second of these sections relates primarily to motions for a new trial. It seems to be complete in itself. It affirmatively states that a motion for a new trial may be made upon certain conditions for any cause for which by law a new trial may and ought to be granted, and among those conditions there is no requirement that notice of the motion should be given at the time of rendering the judgment. The words "as set forth in the last preceding section" refer to the classes of judgments enumerated in the preceding section, and not to the other provisions of that section. That (the preceding) section relates primarily to the entry of judgment and the issue and stay of execution. The requirement that notice of a motion for a new trial should be given at the time of rendering the verdict or judgment is set forth merely as a condition of staying execution, and not as a condition of making a motion for a new trial. Whether such notice is necessary for the

purpose of staying execution, in view of the last sentence of the second of these sections, need not be determined. The reason, if any, for holding that these sections are inseparable in this respect, is that unless a motion for a new trial would suspend the judgment it would be useless to make it, or, to put it in another way, that, if execution may issue under the first of these sections unless notice of the motion is given at the time of the judgment, it would be futile to make the motion unless such notice were given. But this reason would apply with equal force to prevent the case from being taken to the Supreme Court on exceptions or writ of error for errors made during the trial, because, if execution may
369 issue at once unless notice of a motion for a new trial is given, it may issue notwithstanding the allowance of a bill of exceptions or the issuance of a writ of error when no motion for a new trial is made or notice thereof given. If it is replied that the statutes on writs of error and bills of exceptions contain provisions for a stay of execution, it may be rejoined that the second of the sections now in question likewise contains such a provision—not to mention the provisions of Section 1481 in the same chapter. As already intimated, the construction of these sections is not free from difficulty, and the fact that they were not drawn, as is evident, with due regard for harmony between them or for all the circumstances that might arise calling for their application, justifies a more liberal construction with a view to carrying out the general intent.

The chief difficulty in the way of this construction is that the court, only two of its members sitting, in Kekaua *v.* Kalei, 3 Haw. 683, held that notice of a motion for a new trial, based on the ground that the verdict was contrary to the law and the evidence, should have been given reasonably soon after the verdict, and was too late when made on the following day. That decision was undoubtedly correct under the rule of court then in force and referred to by the court, that an exception to a verdict must be taken at the time the verdict is rendered, for the exception was not taken, as well as the notice not given, until the next day, but the court based its opinion chiefly upon the ground that the notice was not given and that it was required by the first of the two sections of the statute above quoted. The decision is brief, and does not refer to the second of the sections above quoted, and it does not appear with what degree of care the question was considered. In so far as it was based on the statute, it does not commend itself to us, but it will be sufficient without reversing it to decline to extend it beyond the facts of that case. In the present case there is no rule of court in force similar to that then in force, and in this case the motion for a new trial is not, as it was in that case, based on the ground that the verdict was contrary to the law and the evidence. We believe that it has been the common practice here to include among the grounds of a motion for a new
370 trial errors of law committed during the trial, as well as the inconsistency between the verdict and the law and the evidence, and without giving notice at the time of rendering the verdict that the motion would be based upon those grounds. Moreover, the statutory provisions in question can not be held to apply in all cases

of motions for a new trial, in so far as giving notice of the motion at the time of rendering the verdict is concerned; as, for example, when the motion is based upon matters arising subsequently to the verdict or judgment, such as newly discovered evidence, misconduct of the jury, etc. Rules of court also have required notice to be given only when the motion was based on the ground that the verdict was contrary to the law and the evidence.

Whether the fifty-five exceptions, or any of them, taken to the order of nonsuit and to the discharge of the jury, which were specifically made grounds of the motion for a new trial, may be considered ultimately, not as independent exceptions set forth in the bill, but incidentally in considering the exception to the dismissal of the motion for a new trial, or an exception to the denial of that motion in the event that the case should be remanded to the circuit judge for a ruling upon the motion, inasmuch as that motion was based in part upon errors not specifically enumerated therein occurring during the trial, we need not say at the present time; nor need we say now whether we can consider the question whether the motion for a new trial should have been overruled. In our opinion, the plaintiff was in order in making the motion for a new trial, in excepting to the dismissal of that motion, and in bringing that exception here in a bill of exceptions.

The motion to strike from the calendar and dismiss the bill of exceptions is denied.

Plaintiff in person; Robertson & Wilder with him.

Defendant Magoon in person; Kinney, McClanahan & Cooper and S. H. Derby with him.

(S'g.) W. F. FREAR.
(S'g.) F. M. HATCH.

371 HARTWELL, *J.*:

I agree that the bill of exceptions can not be dismissed, and that we must consider the exception to the dismissad of the plaintiff's motion for a new trial, which in effect was a denial of the motion. I also concur in the opinion that no notice of the motion was required to be given at the time of the nonsuit; that it remains to be considered whether this court, in deciding upon the legality of refusing the motion for a new trial, can consider all the rulings during the trial to which exceptions were taken. My impression is that the general reference in the motion to errors during the trial is insufficient to bring them before the court as questions of law; but that is for future consideration after hearing argument.

But I think that the power of the circuit courts to grant new trials in cases of nonsuit is found in the common law of Hawaii, and not in its statute, Sec. 1463 C. L., which appears to me to provide for a new trial on the motion of a defendant only. The prerequisite of the motion there authorized is "upon filing a sufficient bond of security, conditioned for the payment of all costs of motion in case he fail to sustain the same, and that he will not to the detriment of the plaintiff in the action, remove or otherwise dispose of any property he may have liable to execution on such judgment, and upon

giving notice of said motion and the grounds thereof to the opposite party." *Ib.*

It is also difficult, I find, to regard the new trials named in that section as distinct from the new trials in the cases contemplated by the previous section, namely, "immediately upon the rendition of a verdict or of a judgment of the court in banco, or of a judge at chambers," which requires immediate entry of judgment, and also that execution issue thereon, "unless notice is given at the time of rendering the verdict or judgment of a motion for a new trial, and the filing of a bill of exceptions and bond as provided by statute within ten days after rendition of such verdict or judgment."

372 The power of the circuit courts at *nisi prius* to grant new trials of civil causes in certain cases not provided for by statute has been so long recognized by this court as to become common law of Hawaii. The practice has long been well settled that not only a defendant but a plaintiff may obtain a new trial, and that either party may do so upon the discovery of new evidence, or of misconduct of the jury too late to give notice of such motion at the time of the rendition of the verdict or judgment. Perhaps the limit of time for such motions, when not otherwise provided by rules, would be the term within which a court has inherent power to vacate its own judgments.

By English common law as regulated, if not declared by early statute of William IV. and George IV., a practice was established of taking out a rule during the term of four days thereafter to show cause why a new trial should not be granted, and this practice included cases of nonsuit. Whitley *v.* Roberts, 1 Exchequer (McC. & Y.) 109, Note A; Great Northern Ry. *v.* Mossop, 17 Com. Bench 134; Lloyd *v.* Berkovitz, 16 M. & W. 30; Plumley *v.* Isherwood, 12 M. & W. 189.

Except as herein modified, I concur in the opinion of the court.

(S'g.) ALFRED S. HARTWELL.

373 Supreme Court of the Territory of Hawaii, October Term, 1904.

T. M. HARRISON
v.
J. A. MAGOON ET AL.

HONOLULU, MONDAY, *December 5th*, 1904.

Clerk's Minutes.

Exceptions from Circuit Court, First Circuit.

Before Frear, C. J. Hartwell and Hatch, J.J.

Robertson and Wilder, T. M. Harrison appeared for the Plaintiff and Kinney, McClanahan & Cooper and S. H. Derby for the defendants.

Mr. Robertson makes a statement of the case and argues.

Mr. Harrison argues.

At 4.12 P. M. the Court adjourns for the day.

TUESDAY, *December* 6, 1904.

At 10 A. M. Mr. Harrison continues his argument.
Mr. Derby argues.
Mr. Harrison replies.
The Court takes the matter under consideration.'
(S'g.) GEORGE LUCAS, *Clerk.*

374 December, 1904.

THOMAS MILNER HARRISON
v.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA EMERSON (*née* LAMB), T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, and GEORGE D. MOORE.

Exceptions from Circuit Court, First Circuit.

Argued December 6, 1904. Decided December 19, 1904.

Frear, C. J., Hartwell and Hatch, JJ.

PRACTICE—*specifying errors relied on as ground of motion for a new trial.*—A motion for a new trial need not unless required by the court specify the errors alleged to have been made during the trial and relied upon as a ground for a new trial, but unless specified, so that it may appear that the court ruled upon them expressly, they are improperly presented in a bill of exceptions not filed within the requisite time after the entry of the judgment.

NONSUIT—*misjoinder of parties defendant.*—A nonsuit is properly ordered upon failure of the plaintiff in an action against joint contractors to prove that any of the defendants executed or ratified the agreement declared on.

EVIDENCE—*insufficient to show ratification of agreement.*—Four partners of a Hagey Cure Co. signed an agreement in New Zealand whereby the company took in the plaintiff and another as new partners, agreeing to give them £2,250 if, after a certain trial they were not satisfied with the conditions of the business. The three partners resident in Honolulu did not sign or authorize the signing of the agreement. Letters were received in Honolulu from one of the partners in New Zealand mentioning that they had "sold one-half interest in Tasmania for 8,000 sheep and £500" and that "the sale of Tasmania was for nine-twentieths of the
375 territory," and that one of the partners (not having signed the agreement), was coming to Honolulu and would "put things to you as they are." About the same time the partners here received an 18 per cent. dividend on their stock, a small portion of which appeared to have been derived from the Tasmania sale, as shown by the trial balance received at the same time. Held: That this was not evidence on which the partners in Honolulu could be held to have ratified the agreement.

AGREEMENT—*construction of—several liability.*—An agreement purporting to be made between the H. Co., composed of C. K., M., P., M., McS., A. and L. of the first part and G and H. of the second part, whereby "the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated" is an incomplete agreement for the purpose of forming the proposed partnership unless all the parties sign; there being an implied term in the agreement that all should sign in order that the signers incur several liability. There being no partnership formed in this case in consequence of the failure of four of the parties to sign the agreement, no partnership rights or duties were created by the incomplete agreement.

Opinion of the Court by HARTWELL, *J.:*

This was an action of assumpsit for breach of agreement declared on in a former action brought by the plaintiff against Magoon, McStocker, Ables and Emerson, in which the declaration was held bad for non-joinder of the other parties to the agreement, which appears in the report of the case. 13 Haw. 339. The plaintiff then joined the other parties and obtained a verdict which was set aside on exceptions on the ground that the court erroneously instructed the jury that the agreement was within the scope of the business of the articles of association of the A. P. & I. H. Co. The articles appear in the report of the case. 14 *Ib.* 420. At the next trial the plaintiff was nonsuited because in addition to several other reasons which in the view we take of the case are immaterial, the evidence did not show that the defendants Magoon, McStocker or Emerson had authorized or ratified the agreement. The nonsuit was ordered November 9, 1903, judgment thereon was en-
376 tered November 12. Defendants moved for a new trial November 14 for errors at the trial as well as in granting the nonsuit. January 15, 1904, the motion was dismissed and time for filing the bill was extended. But, unless the filing of the motion suspended the entry of the judgment, the exceptions taken during the trial were not presented within the time required by statute. A motion of the defendants to dismiss the bill on the ground that the exceptions taken at the trial were improperly incorporated in the bill was denied on the ground that the exception to the nonsuit required consideration. 16 *Ib.* 170. We are of the opinion that the only exception in the bill which was presented within the time required by law is that which was taken to the dismissal of the motion for a new trial. The remaining exceptions, which were taken to rulings during the trial, were not "incorporated in the bill of exceptions and presented to the judge" "within twenty days after final judgment or such further time as may be allowed by the judge," as required by the statute (Laws of 1903, Act 32, Sec. 18). The motion for a new trial, although properly made, as held in the previous decision (*Ib.* 176) did not suspend the judgment or operate as an extension of time within which to incorporate such exceptions

in a bill or present the same to a judge. The motion for a new trial was based specifically upon an alleged error in granting the nonsuit and of course the correctness of the ruling on the motion for a new trial may be considered by this court in so far as the granting of the nonsuit is concerned. The motion for a new trial was based also generally upon alleged errors occurring during the trial. Such a motion may be properly based on the general averment of errors committed during the trial provided a specification of the errors is not required by the trial judge or ordered by him at the request of the opposite party. The rulings are usually fresh in mind and there would be no occasion to delay argument until preparation of the transcript. But it does not follow that an exception to a denial of the motion for a new trial would bring before the appellate court all errors thus generally relied on in the trial court. We
377 cannot say that the circuit court in denying the motion ruled upon any question of law concerning its rulings during the trial, or that any question of law relating thereto arose at the hearing on the motion. The plaintiff may have relied on the ground named in his motion that the nonsuit ought not to have been granted on the evidence. At any rate he did not obtain specific rulings on the correctness of any of the trial rulings and therefore there is no question before us concerning them. The only exceptions which we can consider are those which are taken to rulings made by the circuit court "whenever any question of law shall arise in any trial or other proceeding." Sec. 1436, C. L. The only question which we can consider is whether the nonsuit was right. If, on the evidence, a finding that the agreement was ratified by Magoon, McStocker and Emerson would not have been justified, then as far as they are concerned the nonsuit was right. This court has held that the powers of attorney under which the names of Magoon, Emerson and McStocker were signed to the agreement did not authorize the signing. 14 Haw. 424. The evidence at the former trial which the plaintiff offered to show as ratification of the agreement was certain letters which were ruled out, and upon the competency of which for the purpose for which they were offered the court declined to pass in ruling upon the exceptions to the verdict. *Ib.* 425. The plaintiff claims that the agreement was ratified by the partners in Honolulu because, after learning from Australia that the partners there had "sold one-half interest in Tasmania for 8,000 sheep and £500" and that "the sale of Tasmania was for nine-twentieths of the territory," and that Moore, one of the partners, was coming to Honolulu on his way to Texas and "will put things to you as they are," they had failed to inquire of Moore concerning the exact terms of that agreement; and the plaintiff especially contends that when the partners here received about October 30, 1897, the 18 per cent. dividend, a portion of which was derived from the Tasmania sale, as shown by the trial balance received by them at the same time, their keeping that por-
378 tion of the dividend and failing to make inquiry as to the terms of the agreement amounted to deliberate and intentional ignoring of the terms, which would be equivalent to

ratifying them. If it be true, as the plaintiff claims, that the partners resident in Honolulu had sufficient information from the letters, trial balance and accounts transmitted with the 18 per cent. dividend to apprise them that a new partnership had been formed according to the methods adopted when they themselves entered the business and when Wolfenden was admitted in Australia, and that a portion at least of the dividend was derived from the sale of the Tasmania territory, which sale according to the methods of the concern involved the taking in of a new partner, and also assuming that they regarded the Tasmania sale and the taking in of a new partner as unauthorized by them, it does not follow that they could have inferred from any of these things that any personal liability was incurred by the latest agreement concerning Tasmania and taking the plaintiff Harrison into the partnership. Nothing which had been done before, whether with or without their authority, could have led the Honolulu partners to imagine that an agreement had been made in Australia purporting to bind them jointly and severally to pay the new partner Harrison 2,250£ if he should not be satisfied with the Tasmania business. It is not a case in which parties are chargeable with knowledge of all the facts because they knew or had reason to suspect the existence of some of them. The circumstances did not impose upon the Honolulu partners a duty to follow up a line of inquiry in order to ascertain the extent of the new liability attempted to be placed upon them. In Parker v. Cartwright, 7 Haw. 605, the opinion of Dole, *J.*, refers to the law concerning "ignorance of facts of which the parties might have informed themselves," of the effect of "ignorance due to deliberate negligence," and to circumstances which place parties "upon their inquiry," and require that they should "have sought for information from available sources." Many decisions on this subject are cited in the plaintiff's brief, but they do not apply to the facts
379 of this case. There was no evidence on which the jury could properly have found a ratification of this agreement. As to accepting the dividend: As the court held in the former case, "If the acceptance be in ignorance or under misapprehension of any of the essential circumstances relating to the transaction, this will absolve the principal from all liability by reason of any supposed assent to the previously unauthorized act of the agent." *Ib.* We therefore sustain the nonsuit as to the defendants Magoon, McStocker and Emerson and there is no occasion, as far as these defendants are concerned, to discuss the correctness of any of the other rulings, since unless the agreement was either made or ratified by them they cannot be held under it. But the plaintiff claims that the court ought to have nonsuited the plaintiff as far only as these defendants are concerned and permitted him to take judgment against the others who did execute the agreement. The statute, he says, required him to implead all the obligors and therefore he ought not to be deprived of his remedy against the other defendants. The statute does not require persons to be impleaded who are not in fact obligors. A declaration would be good if framed to meet the case of an agreement entered into by only a por-

tion of the names appearing in it and not joining the names of others signed by attorney provided the plaintiff is willing to admit and avers in his declaration that the other names were signed without authority. By declaring against all, however, he took the chances of being able to show that they had all executed the agreement, and was liable to "be nonsuited at the trial of he fail in proving a joint contract," (1 Ch. on Pl., 51), unless this was an agreement binding upon the defendants severally as well as jointly.

In considering the demurrer in the first action the court construed the agreement that "the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated" as being in effect that "the parties of the first part do hereby jointly and severally make with the parties of the second part
380 the following agreement of partnership." 13 Haw. 360. It is contended on behalf of the defendant Ables that this was *obiter dictum* and the court is not precluded from now considering whether a several liability was created by the agreement. In passing upon the demurrer the court decided upon the effect of not joining all of the contractors, but unless the declaration alleged a joint liability it would have been unnecessary to join them if there was a several liability. The declaration appears to have been framed upon the theory of joint liability of the defendants Magoon, McStocker, Ables and Emerson. If they were jointly liable the other parties to the agreement were so also, and perhaps it was unnecessary to pass upon the question of several liability. We consider the question open for reconsideration. The agreement purports to be "made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members: T. E. Cowert, J. H. Kirkpatrick and Geo. D. Moore, of the state of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison, both of the city of Auckland in the colony of New Zealand, parties of the second part." It is not clear in what sense the words "individually" and "collectively" are used. To hold that the members of the original partnership, in using the word "individually," intended that they should be severally bound if all were not would be going further than we think is authorized by the agreement. In denying the plaintiff's motion for a rehearing of the decision sustaining the demurrer the court said: "Whether or not, if it shall appear hereafter that some of the persons named as defendants neither executed nor subsequently ratified the execution of the agreement, the others can still be held jointly liable, and * * * are questions which have not yet arisen and upon which no opinion
is expressed." 14 *Ib.* 532. The court evidently had in mind
381 the question whether the agreement would be complete unless all signed or ratified. Courts sometimes classify agreements between several persons as "incomplete" if not signed by all who are

named in them. This is on the theory of an implied term that all are severally bound in case only of all signing. In looking at the present agreement we reach the same conclusion by applying the theory of an implied term and by looking at the words used and the intended object. It is essential to a partnership agreement that each person mentioned as a partner severally agrees upon being so; and each of such persons can if he likes agree that the proposed partnership shall do certain things, or that the old firm of which he is a member shall enter into the new partnership and then do certain things. We do not see any such undertaking in the language used in this agreement. "In order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of severalty contained in it." 2 Chit. Cont., 11 Am. Ed., 1354. An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any one of them unless all execute or subsequently ratify the agreement. The thing to be agreed upon was that all the parties named and not certain of them should form a partnership. If no partnership was formed then there were no partnership rights or duties created by the incomplete agreement. The agreement which purported to be made between the Hagey Co., composed of Cowart, Kirkpatrick, Moore, Powter, Magoon, McStocker, Ables and Lamb of the first part and Gilmore and Harrison of the second part, was that the Hagey Co. collectively and its members individually "do hereby constitute and accept the said parties of the second part as partners as hereinafter stated." The
382 partners who signed did not severally agree that they severally would form a partnership with Gilmore and Harrison but that all of the partners did so. The agreement was ineffective for the purpose of forming a new partnership in consequence of the failure of certain of the Hagey Co. partners to execute it, and therefore Gilmore and Harrison were not constituted or accepted as partners and acquired no partnership rights. The views above expressed render discussion of the other exceptions unnecessary.

The exceptions are overruled.

Robertson & Wilder for plaintiff, who also appeared in person.

J. A. Magoon and J. Lightfoot, Kinney, McClanahan & Cooper and S. H. Derby for defendants.

(Sg.) W. F. FREAR.
(Sg.) ALFRED S. HARTWELL.
(Sg.) F. M. HATCH.

383 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff, Appellant,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON, *née* LAMB, ET ALS., Defendants, Appellees.

Petition for Rehearing.

Thomas Milner Harrison, plaintiff Appellant in this case, asks the Court for a rehearing of this cause, on the following grounds.

I.

In 13 Hawaiian 360 this Court in referring to paragraph 4 of the agreement for breach of which this action is brought says:

"The paragraph, however, cannot we think, be read by itself; it must be read in connection with the opening sentence above quoted, and if so understood the result is the finding that the promise in question was a joint and several obligation on the part of the members of the company."

The decision, concerning which this rehearing is prayed, holds the above quoted ruling "open for re-consideration." It then holds that as the said agreement purported to form a new partnership it could not be completed until all the persons who were intended to form the new partnership had either personally signed it, or ratified the acts of those who signed on their behalf. Consequently, if any of the parties to it failed to ratify it, the agreement would be incomplete.

Thus the members of the Hagey Co. contracted jointly with
384 Harrison and Gilmore and not jointly and severally, and, as a result, if they all were not bound by that agreement, it being only a joint obligation, none of them would be bound. The Court, however, had already found that Magoon, McStocker and Emerson had not been bound by the agreement when it was made, nor yet had the plaintiff been able to produce evidence that they had ratified it. Hence the Court ruled that none of the members of the Hagey Co. were bound. The Court further held that as all the defendants were sued jointly, if the plaintiff failed to show that they were all bound by the agreement then he was liable to "be non-suited at the trial if he fail in proving a joint contract."

This last proposition, that the plaintiff was liable to be non-suited against all the defendants if he failed in proving a joint contract, was not fully argued by the plaintiff at the last hearing before this Court, as he considered that the ruling quoted from 13 Haw. 360 was final; and that, consequently, he was suing for breach of a joint and several contract. And the plaintiff further respectfully submits that such cases as he did quote,—to show that though he failed to prove a joint contract against the defendants when they had contracted jointly, and not jointly and severally, he yet was entitled to recover against such of them as had undertaken, without due authority, to bind all the defendants jointly,—were overlooked.

In Taft *v.* Church 162 Mass. 528, referred to in plaintiff's brief on last agreement, when "an agreement in writing, under seal, was signed by A. in the name of a firm composed of A. and B., it was held: "If one of two partners, without the knowledge or consent of the other, executes a contract which is outside the scope of the partnership business he may be bound, although the other is not."

It was also there held "In an action against two person- as partners if one only is held liable judgment may be entered against him alone, under Pub. Stat. 171, sec. 5, and no amendment of the declaration is necessary.

385 In Harrington *vs.* Higham 15 Barb (N. Y.) 524, referred to in said brief but like Taft *vs.* Church not there quoted from, it was held;—where some of the members of a firm had agreed on behalf of the firm (and not for themselves severally) to submit a matter to arbitration without having authority to make such an agreement,—

"A recovery may be had upon such an award, against the partners consenting to the submission, on a complaint against all the members of the firm, alleging a joint liability.

"Under the 274th section of the code &c. * * * The true criterion now is, whether a separate action might have been maintained. If it could, a several or separate judgment is proper."

The law on this point is explained fully in 11 Ency. of Pl. and Pr. 847 *et seq.* where it gives the rule, as stated in the decision concerning which a rehearing is requested, as follows:

"At common law, where several defendants are sued jointly in an action contract, the plaintiff must have judgment against all of the defendants who are before the Court, either by service of process or by appearance, or he can have judgment against none."

But succeeding this statement at *Idem page* 853 *et seq.* it reads:

"The common law rule in respect of judgments in actions *ex contractu* against joint defendants has been changed by statute *in most, if not all, of the states,* so that in actions against several upon contract the plaintiff may have judgment against one or more of the defendants if he shall make out a good cause of action against them, although he may fail as to others, whether the contract be joint or several, or joint only."

The statute referred to in the last quotation is in Massachusetts, New York, and nearly all the states the same as in California, where it is given in section 578 of the Deering California Code of Civil Procedure as follows:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

The section last quoted is generally considered as a necessary sequel to section 383 of *Idem,* which reads:

"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may *all* or *any* of them

be included in the same action, at the option of the plaintiff."
386 Section 1222 of our Civil Laws provides:

"It shall be necessary to join as defendants in a civil action, *all* the joint and several, or joint makers of promissory notes, etc."

Now it is respectfully submitted that when it was not left even optional for the plaintiff to join (all or any) of the joint and several or joint defendants, as is done in California it must have been the intent of the law makers that; "Judgment may be given for or against one or more of several defendants; and it may, when the justice of the case requires it determine the ultimate rights of the parties on each side, as between themselves." This is specially apparent when we consider the exceptionally liberal terms of the Hawaiian statute of 1903. Act 78 page 366, which enlarges the terms of the Civil Laws sec. 1260 by amending it so as to read as follows:

"Whenever a plaintiff in an action shall have mistaken *the form of action suited to his claim,* the Court or Judge, on motion, shall permit amendments to be made on such terms as it shall adjudge reasonable; and the Court or Judge may, in furtherance of justice and on the like terms, at the trial or on appeal, *or at any other stage, before or after judgment,* allow *any petition* or pleading or process or proceeding to be amended by adding or *striking out* the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, *or by inserting other allegations material to the case,* or, when the amendment does not *substantially change the claim or defense,* by conforming the pleadings or the proceeding to the facts proved.

We consequently submit that the last quoted statute in conjunction with the Civil Laws sec. 1222, alters the common law rule so that when defendants are sued jointly the plaintiff may amend by discontinuing against such as he fails to make a good cause against, and proceeding against "one or more of the defendants he shall make out a good cause of action against." And then as a result "Judgment may be given for or against one or more of several defendants; and it may (the Court) when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

At the trial of the case at bar, when the Circuit Judge found no case was made against the defendants Magoon, McStocker or Emerson, he refused to let the plaintiff amend by striking out the names of those parties and proceeding against such as personally
387 signed the contract. And when the motion for New Trial was heard, the right of the plaintiff to amend by discontinuing as against Magoon, McStocker and Emerson, and proceeding ag-inst Ables, and perhaps the others, was the point most stren-ously urged, and the trial Judge said he thought the plaintiff was entitled to so amend and proceed but held that he had not power to grant a new trial after non-suit. Hence we contend that such an amendment should be now allowed and the case remitted to the Circuit Court for trial as against the defendants, other than Magoon, McStocker and Emerson above named.

In Texas where, as here, there is no statute referring to judgments similar to section 578 of the California Code just quoted but merely

a statute providing for the joinder of defendants at the option of the plaintiff and not making such joinder necessary as has been done here, it was held in Willis *vs.* Morrison 44 Texas 27 that:

"In a suit against A. and B. on a draft, which on its face appears to have been executed by both of them as partners *in the Firm name*, but which was executed by A. only, judgment may be rendered against A. and in favor of B. when it is shown under plea of *non est factum*, that the draft was not executed by B. or by his authority.

"The rigid system of the common law regarding forms of action which required the plaintiff to be non-suited if he sued two persons on a joint contract, and one of them showed himself not to be liable, has no application here."

Willis *v.* Morrison, 44 Texas 27.

This matter was threshed out at length in three decisions in California. The first one was in Rowe *vs.* Chandler 1 Cal. 168, which held

"Where two persons are sued jointly upon a joint contract, judgment may be rendered in favor of the plaintiff against one of the defendants, and in favor of one of the defendants against the plaintiff. Thus, where A. sued B. and C., as partners, and the misjoinder was not set up in the answer, and the plaintiff's demand was proved against B. but not against C. and verdict and judgment were given in favor of the plaintiff against B. and in favor of C. against the plaintiff, on appeal, the case was confirmed."

At page 170 in the same case the report says:

"It was settled law, under the old system of practice that where one of several joint contractors was sued, the plaintiff might proceed and take judgment against him, unless he interposed a plea of non-joinder in abatement (1 Chitty's Pl. 52, 53); whereas, in case
388 too many persons were made defendants, it was a fatal defect, according to circumstances, upon demurrer, motion for non-suit at the trial, motion in arrest of judgment, or Writ of Error.

The report again continues at page 175 as follows:

"We have above seen that there is nothing more incompatible with principle in requiring a mis-joinder to be pleaded in abatement, than in requiring a non-joinder to be thus objected to; and we think that the former objection, equally with the latter, ought to be taken in the answer."

In Stearns *v.* Aguirre 6 Cal. 176; Rowe *v.* Chandler, 1 Cal. 168, just quoted from, was overruled and a non-suit similar to that in the case at bar sustained. The syl-abus of that case reads:

"In all cases of joint and several contracts the plaintiff may elect whether he will sue the defendants severally or jointly; having elected to treat his demand as joint, for the purposes of the action, he must be governed by the same rules which would have applied, if his contract originally had been joint, and not joint and several, and it is clearly error to enter several judgments against the defendants.

"There is nothing in the Practice Act of this state which has altered the common law rule."

But in Lewis *v.* Clarkin, 18 Cal. 399, the last ruling was reversed as follows:

"Held: Practice Act has modified the common law rule—that in a suit against several joint debtors the plaintiff must recover against all or none—so far, at least, as to permit judgment, against a portion of the defendants wherever the contract purports on its face to be the contract of all the parties sued and it turned out in proof that a portion only are liable.

"See Stearn *v.* Aguirre 6 Cal. 176; in this respect overruled."

This last ruling has been followed in all subsequent cases in California.

See People *v.* Frisbie, 18 Cal. 399; and numerous other cases mentioned in 11 Ency. Pl. & Pr. 854, note 1, and also Tay *v.* Hawley 39 Cal. 93.

In Morgan *v.* Righetti (Cal. 1896) 45 Pac. Rep. 260; it was held:

"Two persons being sued on an alleged partnership debt, and it being found that they are not partners, but that the debt is the individual debt of one of them, judgment may be rendered against him."

389 See Rutenberg *vs.* Main 47 Cal. 213;
Thain *vs.* Forbes 82 Cal. 577;
Bailey Loan Co. *vs.* Hall 110 Cal. 490;
Gruhn *vs.* Stanley 92 Cal. 86;

And this is the law of California although the statute there permitting amendments, as in all the other Code states, is not so liberal as ours, since it says nothing about amending when the plaintiff has mistaken his form of action, and is less complete in other respects.

See Code of Civil Procedure for California, Section 473.

In New York where the law is similar to that of California in this respect the same practice prevails as in Claflin *vs.* Butterly 2 Abb. Pr. 446; also 5 Deur (N. Y.) 327, it was held:

"The only question is this; the plaintiff having sued the defendants as partners, on a contract purporting to be signed by the firm, and bearing the genuine signature of the firm, can they have judgment against one only, when it is clear that the other defendant is not liable?

"When two defendants are sued jointly on a contract, which, on its face, is the joint contract of both, but which in legal effect was at all times the contract of one only, a judgment may be rendered against the party liable and in favor of the other."

See also Marks *vs.* Bard, 1 Abb. Pr. 63, 8 Howard, Pr. 151;
8 Howard, Pr. 151;
1 Kenn 294.

So in Stedeker *vs.* Bernard 102 N. Y. 327; it was held:

"In acting upon a check signed in the name of a firm, of which defendants were the individual members, defendants joined in an answer which denied that the check was executed by the co-partnership, but averred in substance that it was made by defendant B. for his own purposes and not in the business of the firm, which was known to the plaintiff when he received it. Held: that plaintiff

was entitled to, and might apply to the Court before trial for judgment upon the pleadings against B.

390 "The common law rule, that in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants is no longer the rule of procedure in this state."

As in McIntosh *vs.* Ensign, *et als.* 28 N. Y. 169, it was held

"A plaintiff is not now to be non-suited because he has brought too many parties into Court."

See also Stimson *vs.* Van Pelt, 66 Barb. (N. Y.) 151 and others N. Y. cases mentioned in 11 Ency. Pl. and Pr. 854 note 1.

In Connecticut where the statute law is similar in this respect to that of California, New York, or Massachusetts, in Dean, *vs.* Savage 28 Conn. 359 it was held:

"It was the intent of the statute to apply to all actions founded on contracts the same rule, with regard to the right of recovery against a part of the defendants, which prevails at common law in the case of action founded on torts."

The practice in Idaho, where the statutes in this respect are like those of Cal., is the same as in Cal.

See Gaffney *vs.* Hoyt 2 Idaho 184.

The same statute law and practice exists in Indiana as in Stafford *vs.* Nutt, 51 Indiana 523, it was held:

"In an action against two or more persons, upon contract, whether the contract be joint and several or joint only, the plaintiffs may have judgment against one of more of the defendants, against whom he shall make out a good cause of action, although they fail as to the others."

See also Richardson *vs.* Jones 58 Indiana 240:

The same statute law and Practice exists in Iowa as in Gillam *vs.* Hintrager 60 Iowa 180, it was held:

391 "Where the action was begun against two as partners, but was prosecuted against one of them only, there was no error in rendering judgment upon a verdict against this one only."

See also Eyre *vs.* Book 10 Iowa 586 and other Iowa cases mentioned in 11 Ency. Pl. and Pr. 85 note 1.

The same practice in this respect prevails in Mich. although no code or statute is referred to in the reported cases. In Roberts *vs.* Pepple 55 Mich. 367 it was held:

"Plaintiffs sued defendants jointly on several notes signed, with defendants' partnership name of J. T. Pepple and Co. Wilcox defended on the ground that the notes were given without his assent for private obligations and purposes of Pepple, and that plaintiff did not take them in ignorance of their purpose. The verdict below was in his favor. Judgment rendered against Pepple alone, who has not appealed. Plaintiff brings error, Judgment affirmed."

The same practice prevails in Minnesota, where in Keigher *vs.* Dowler 47 Minn. 540, it was ruled:

"Plaintiff sued three persons as joint defendants, alleging (as the fact was) that they were partners. He proved a cause of action

against two of the defendants, but not against the third. Held, that judgment was properly rendered against two:

"Here the plaintiff sued the three defendants, alleging that they were partners. The proof was that the contract declared on was made by two of the defendants, but was not within the scope of the partnership, and hence no cause of action was proved against the third defendant. * * * The appellant's contention proceeds upon the erroneous idea that the action was not against the individual composing the firm, but against the firm."

The statutes and practice in Missouri are similar in this respect to Cal. In Crews *vs.* Lackand 67, Mo. 619 it was held:

"The common law rule which prohibited recovery against any one of several defendants sued as joint contractors, unless the proof showed a joint contract, has been abrogated by Section 32, p. 1019 Wag. Stat. Under that section a Plaintiff, suing against several as partners for breach of contract, may recover against such as he can prove to be parties to the contract, without proof of the partnership."

392 The same practice prevails in Montana;
See Knatz *vs.* Wise 16 Mont., 555;

The same practice prevails in Nebraska;
See Roggenkamp *vs.* Hargreaves, 39 Neb., 540.
The same practice exists in Ohio;
See Lampkin *vs.* Chisom, 10 Ohio, State, 451.
The same practice and statutes exist in Oregon; 205, it was held:
In Ah Lep *vs.* Wong Choy and Gong Wing, 13 Oregon, 205, it was held:

"Under the code, in an action against two or more partners upon a joint obligation, when a member of the partnership has borrowed money on his own account and the firm is not liable, a separate judgment may be had against the partner who gave the joint obligation."

The same practice exists in Texas, although the code provision as to judgment is not law there;
See Forbes *vs.* Davis, 18 Tex. 274;
Wooters *vs.* Smith, 56 Tex. 198, as well as Willis *vs.* Morrison, 44 Tex. 27 before referred to.

There are some English cases mentioned in 1 Bates on Partnerships, note 2 to section 349, which maintain the same principle; and the last paragraph of the said section 349 reads:

"The partner who signed the firm name without authority is himself bound, the same as if he had signed his own name."

In Ramsbottom *vs.* Lewis, 1 Camp. 279. The last sentence of the report reads: "The declaration states that both partners drew and endorsed the bill; but upon this last supposition, at the time of the endorsement, one partner had no longer any interest in it. The partnership had in fact ceased to exist, and the solvent partner was to be considered as tenant in common of the bill along with the assignees of the other. Nor, as the declaration now stands, would it be enough to show that the bankruptcy of Moffet took place before the bill was drawn; for though in that case it might have been de-

clared upon as the bill of Brown alone, still both are stated as joint partners to it. The jury found a verdict for the plaintiff."

393 So in Owen *vs.* Van Uster, 106, B. 318, it was held:

"That one who individually accepts a bill addressed to a firm of which he is a member is individually liable thereon.

The bill was addressed to the Allty-Crib Mining Company, and accepted by the defendant, as follows: Per. proc. The Allty-Crib Mining Company, W. Y. Van U. London manager: It was proved that four persons, one of whom was the defendant, had agreed to work a mine, under the name of the Allty-Crib Mining Company, and had for some time worked it accordingly; and that the bill in question had been accepted by the defendant without the authority of his co-partners. Held: That the defendant was liable upon the bill, as acceptor."

So in Nicholls *vs.* Diamond, 9 Ex. Welsh, *H.* & 9, 154, it was held:

"A Bill of Exchange directed to J. D., purser, West Downs Mining Company was accepted by him as follows: J. D. per. proc. West Downs Mining Company. J. D. was a member of the Company, which was not incorporated. Held: That J. D. was personally liable on this acceptance."

As to the practice of the English Courts since the Judicature Act of 1848 the case at Bar as tried in New Zealand when judgment was given against all the defendants but two, is very much in point.

In 11 Ency. Pl. & Pr. 854, note 1, it names 27 states in which it is the law. "That in actions against several upon contract, the plaintiff may have judgment against one or more of the defendants if he shall make out a good cause of action against them, although he may fail as to the others, whether the contract be joint or several, or joint only."

It is submitted that such is the law in Hawaii, while the cases, above referred to and quoted from, show that in all the states mentioned where one or more partners contract on behalf of the firm jointly (and not for themselves severally) but have not authority to bind the firm, although so far as the firm is concerned it is an incomplete contract and not binding on it, yet the partners who undertook to so bind the firm without sufficient authority

394 are liable in damages for the failure or breach of the contract that cannot be enforced against the firm, and this although the party to the incomplete agreement claiming damages from the partners who endeavored to bind the firm, but lacked authority to do so, knew of the want of authority at the time the agreement was signed.

We submit that the agreement sued upon in this action, it appearing that Magoon, McStocker and Emerson are not bound by it, is such an agreement as those referred to in the last paragraph; and that, consequently, those defendants, who personally made the agreement and by so doing practically guaranteed that they either had authority to bind the Hagey Company or that the other members of the Hagey Company would ratify their acts, are liable in damages for the non-fulfillment of the terms of the agreement by the Hagey Company. See Story on Agency Sec. 265. We also submit that it

is proper practice for the Court, under the circumstances in this paragraph stated, to permit the plaintiff, to amend his complaint by discontinuing as to those defendants, who, it appears, are not bound, and to proceed against the defendants who personally executed the agreement and those, who, by default, have, at least *prima facie*, admitted that either those who executed the agreement had authority to bind them or that since the agreement was made they have ratified it.

We submit that Harrington *vs.* Higham, 15 Barb. (N. Y.) 524, the second case quoted from in this petition, is peculiarly in point in that two out of three partners were held liable when they had attempted to bind the firm to an arbitration award without due authority, The same is held in Keigher *vs.* Dowlan, 47 Minn. 540.

395 The plaintiff consequently prays a re-hearing on this point on the ground that it was a mistake of law in the decision not to let him so amend his complaint as to discontinue or be non-suited concerning Magoon, McStocker and Ables, but to proceed as to the other defendants, who either personally signed the agreement, or by failing to appear and answer are presumed to have either given those who signed the agreement authority to bind them or have since ratified the agreement.

II.

396 Should, however, the Court see fit to deny the plaintiff a rehearing on the above stated ground, then the plaintiff prays a rehearing in order that he may move the Court to permit him to amend the declaration in this action so that the same shall read according to the copy of proposed amended declaration hereto attached.

He makes this request under Session Laws of 1903, Act 78, page 366, which reads: "Whenever a plaintiff in an action shall have mistaken the *form of action* suited to his claim, the Court or Judge, on motion, shall permit amendments to be made on such terms as it shall adjudge reasonable; and the Court or Judge may, in furtherance of justice and the like terms, at the trial or *on appeal,* or at any other stage, before or *after judgment,* allow any petition or pleading or process or proceeding to be amended by adding or *striking out* the name of *any party,* or by correcting a mistake in the name of a party, or a mistake in any other respect, *or by inserting other allegations material to the case,* or, when the amendment does not substantially change the claim or defense, by conforming the pleadings or the proceedings to the facts proved."

The plaintiff submits that the proposed amendmnet, as stated in the proposed amended declaration, which consists of declaring on a *quantum meruit or a quantum valebant,* when it has been found, after taking testimony in Court, that the express contract under which the *quantum meruit* or *quantum valebant* was given cannot be maintained, is such an amendment as is allowable in states where the statutes permitting amendments are not so liberal as that in force here, that has just been quoted. It is also submitted that it is an amendment which is not barred by the statute of limitations.

In 1 Ency. Pl. & Pr. 516 it is stated: "Although the granting or refusal of leave to amend rests within the sound discretion of the court, a multitude of authorities declare the salutary rule that statutes of amendment are remedial and must be construed and ap-
397 plied liberally in favor of the privilege of amending. *Upon this proposition there are no dissenting authorities.*'

And where amendments are allowed by statute, as here, the action of the trial court in exercising discretion as to amendments is subject to review. *Idem.* 525-532. While where the trial court has held that it had not authority to permit an amendment or refused leave to amend contrary to law, its decision is always reviewable without statutory authority. *Idem.* 531-532.

The fact that the renewing of an action in an amended form is barred by the statute of limitations, as is the case at bar, is also an additional reason why amendments should be allowed.

1 Ency. Pl. & Pr. 518 reads: "Where a proposed amendment consists of new matter relating to the subject of the action as set forth in the complaint, and is not a new and independent cause of action, the fact that the statute of limitations has attached to it pending the suit is a strong reason for allowing the amendment insead of refusing it."

In amending so as to sue for a *quantum meruit* or *quantum valebant* when an express contract has first been sued upon and the plaintiff has failed to establish it, the amendment merely enables the plaintiff to proceed on a promise implied by the express contract should its express terms be unenforceable. The Summary statement of the Rule concerning what amendments are allowable is found in 1 Ency. Pl. & Pr. 564 which reads: "As long as the plaintiff adheres to the contract or the injury originally declared upon, an alteration of the mode in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action."

So again 1 Ency. Pl. & Pr. 621 states that such amendments are not barred by the statute of limitations, as it reads: "Where an amendment does not set up a new cause of action or bring in any new parties, the running of the statute of limitations is ar-
398 rested at the date of filing the original pleading."

Note 3 to *Idem* 621 sets out cases from more than twenty states in *in* support of this statement. The case that perhaps most strongly in all points resembles the case at bar is Cox *vs.* McLaughlin. 70 Cal. 60, which reads: "A complaint in an action for breach of contract, which as originally framed seeks to recover the contract price of services performed by the plaintiff in pursuance of the contract, together with profits which he would have made, on the ground that he had been technically "Prevented" from completing the contract by the defendant, may be amended so as to aver a claim for the value of the services actually done as upon a *quantum meruit.* Such an amendment is not the substitution of a new action so as to continue the running of the statute of limitations until its filing."

Although the syllabus just quoted stated that the plaintiff was permitted to amend so as to sue for a *quantum meruit,* yet the report shows he was permitted to amend so as to sue for both a *quantum*

meruit and a *quantum valebant,* as the amended complaint was for not only the value of services rendered, but for material furnished as well. The amendment was filed nearly twenty years after the action had been commenced.

Cox *vs.* McLaughlin still further resembles the case at bar in that final judgment by the Court of last resort, reversing a verdict for the plaintiff, had been given for the defendant, when application was made for a rehearing on the ground that the plaintiff was entitled to amend so as to sue for a *quantum meruit* and *quantum valebant,* although he was not entitled to recover on the express contract upon which the action had been originally based. The rehearing was granted and the plaintiff having amended his complaint was afterwards successful.

399 The theory, we apprehend, upon which a plaintiff may amend so as to sue for a *quantum meruit* or a *quantum valebant* in order to recover for a consideration given under an express contract which he has been unable to enforce by the original suit, is that the implied promise which he has to expressly plead when suing for a *quantum valebant,* arises from the original contract, that is, that the person who received the consideration impliedly promised when he made the express contract, to return it, should the express contract essentially fail.

"Where a special Contract is imperfect, the plaintiff may declare on the implied promise."

4 Encyc. Pl. & Pr. 927.

So in other cases it was laid down: "Upon the trial the plaintiff was allowed to amend his complaint, so as to recover the actual value of the services rendered by him to the defendant, on the ground that as the contract, upon which the action was brought was void, he was entitled to recover the value of the services actually rendered.

"Held that this was proper. That it was not substituting a new cause of action, but in legal effect, conforming the pleadings to the facts.

Yurnow *vs.* Hochstadter 7 Hun (N. Y.) 80.

"An amendment of a complaint, which alleges an agreed price for services, by inserting an allegation as to their reasonable value, does not change the cause of action."

Copeland *vs.* Johnson Mfg. Co. (Supreme Court) 3 N. Y. Supp. 42;

1 Ency. Pl. & Pr. 565 (Note 5 to page 564).

"Plaintiff sued on a *quantum meruit* for carpenter's work done, and material furnished in the completion of defendant's house. Defendant answered that there was a special contract whereby plaintiff undertook to complete the job by a given time, for a specified sum; that the house was consumed by fire before completion by the plaintiff, so that nothing ever became due the plaintiff; and

400 that more than two years had elapsed since the making of the contract and before commencement of the suit, and, therefore, the action was barred by limitation, etc."

Plaintiff, by amendment, adopted the special contract alleged by the defendants, but claimed that it was apportionable etc. The house was burnt in December 1868, and when plaintiff had nearly completed it, the suit was brought in November, 1868, and the amended petition adopting the special contract was filed in January, 1869, and more than two years after the performance of the work and the destruction of the house. But held, that the amended petition did not set up a new cause of action, and, therefore, the plaintiff was not barred by limitations.

Hollis *vs.* Chapman 36 Tex. 1.

A copartner, with power to settle and adjust the affairs of the copartnership, has no authority to use the name of the firm in such settlements to create new contracts or liabilities.

"A note given in pursuance of such authority in settlement of an outstanding account against the firm, is not binding upon the other members, and is not a discharge of such claim."

"In a suit upon a note so given, leave was granted to amend by filing a new count for the original claim."

Perrin *vs.* Keen 19 Me. 355;
1 Ency. Pl. & Pr. (567) note 5 to page 564.

"Where plaintiff declared on a note and for money expended on an *insimul computasset* and for work and labor and materials, he was allowed to amend by claiming to recover on a due bill and a book account."

Fairchild *vs.* Dennison 4 Watts (Pa.) 258.

Amendment of complaint by allowing the addition of a count for money had and received to a complaint founded on contract permitted in.

Rodrigue *vs.* Curier 15 S. & R. (Pa.) 81.

"*Quantum valebat.*—Where the complaint proceeds upon the basis of a contract price it may be amended by claiming damages by reason of the breach of a contract so as to conform to the proof."

401 Evans *vs.* Warner, 21 Hun. (N. Y.) 547;
Also I Ency. Pl. & Pr. 548 (note 1 to *Idem* 583).

Suit brought on note; amendment stating as cause of action the debt due, held not to be new cause of action or barred by statute of limitation.

Bryce *vs.* Massey 14 S. E. Rep. 768;
See Heath *vs.* Whidden 29 Me. 108;
See Kuhn *vs.* Brownfield 12 S. E. 519;
See Dance *vs.* McClure 39 Vt. 196;
See Bruns *vs.* Schreiber 48 Minn. 366.
See Chicago Elc. R. Co. *vs.* Bills 118 Ind. 221.

The last six cases all maintain the last stated principle.

"An action for money had and received may be amended by declaring on a promissory note given therefor."

Brackett *vs.* Crooks 24 N. H. 173;
1 Ency. Pl. & Pr. 546 note 5 (567).

So an action on a note may be converted into an action for goods sold and delivered.

Burnham *vs.* Spooner 10 N. H. 165;
Libley *vs.* Young 26 S. Car. 415.
Stephens *vs.* Thompson 28 Vt. 77;
Pierce *vs.* Wood 23 N. H. 519;
Stevenson *vs.* Mudgett 10 N. H. 338.

"The plaintiff, on the request of the defendant paid for a share in oil land alleging that he had been deceived by defendant, he sued him in case and declared in assumpsit; for money had and received. Plaintiff was nonsuited at the trial; the nonsuit was afterwards taken off, and plaintiff permitted to declare in tort for the deceit."

"The cause of action accrued more than six years before the
402 amendment but not before the bringing of the suit. Held the cause of action being the same, the statute of limitations was not a bar."

Smith *vs.* Bellows 77 Pa. St. 441.

"Where an action is begun within the time prescribed by the statute, and certain relief is asked, and, after the cause would be barred by the statute, the plaintiff files an amended petition, setting up the cause of action, but asking different relief, held that the amendment is not the beginning of a new action, but a continuance of the old one, and that the action as founded on the amended petition is not barred."

Case *vs.* Blood 71 Iowa 632.

"If the facts set forth as the basis of recovery are the same in an original and in an amended petition, though the relief prayed for in the amendment may be different, the cause of action remains the same.

Telffner *vs.* Dillard 70 Texas 140;
Also held in Western Union Tel. Co. *vs.* Brown 62 Texas 36.

"A declaration on the bond of a residuary legatee alleging the failure to pay a claim is amendable by adding a count alleging the failure to pay a note which constituted the claim, even though the note itself was outlawed; no new cause of action is added by such an amendment."

Abbott *vs.* Chambers 55 Mich. 410;
See also Baltimore Elc. R. Co. *vs.* Gibson 41 Ohio State 145;
Ely *vs.* Early 94 N. Car. 1;
Myers *vs.* Kirt 68 Iowa 124.

"Where the facts as stated in the original complaint show different parties from those first named as plaintiffs or defendants to be entitled or liable, an amendment, changing the parties to the suit so that those really entitled or liable are the only parties to it, is not barred by the statute of limitations."

"The Courts possess the power at any time before or after judgment, to amend, by adding or striking out the name of any
403 party or by conforming the proceedings to the facts proved."

Ballard *vs.* Johnson 65 N. C. 436.

So in Dowsett *vs.* Jones 9 Haw. 543 it was held: "The plaintiff is given leave to amend by striking out the name of the husband, as defendant, in view of the circumstances of the case, and especially of the fact that the statute of limitations has become a bar to a new action since the commencement of this action.

"Amendment substituting new plaintiffs allowed, as not barred by statute of limitations."

Wood *vs.* Lane 84 Mich. 521.

"In an action on a contract alleged to have been made with plaintiff, an amended complaint showing that the contract was made with plaintiff and another jointly, and that plaintiff had acquired the interest of the latter, introduces no new cause of action, so as to be barred by the statute of limitations."

Sublett *vs.* Hodges 7 Southern Rep. 296.

"The time to which the statute of limitations runs is the filing of the original complaint. The filing of an amended complaint does not extend this time up to the period when it was filed."

In this case just quoted from Loranzana *vs.* Camarilla 45 Cal. 125, the amendment pleaded a less number of parties than did the original complaint, yet the amendment was allowed.

See Link *vs.* Jarois 33 Pac. Rep. 206.

"The addition of the name of a silent partner in an amended petition filed in the firm name or enlarging the prayer for relief by amendment, is not a statement of a new cause of action, and will not be subject to amendment to a defense of limitation, which would not be applicable to the original petition."

McIlhenny *vs.* Lee 43 Tex. 205.

Amendment of action against two defendants so as to continue action against one only, not new cause of action.

See Usher *vs.* Skidmore 28 Texas 616.

404 "Statutory authority to allow amendments striking out defendants, who are improperly joined is now almost or quite universal."

1 Ency. Pl. & Pr. 545 and note 1.

The introduction of the two agreements marked (Exhibit B.) and (Exhibit C.) respectively into the amended declaration to show that sheep and an interest in lands were conveyed to Ables is merely stating more fully the consideration of 2000 pounds mentioned in clauses two (2) and five (5) of the agreement sued on in the original complaint, and is consequently merely an amendement stating facts more fully, and not for that reason barred by the statute of limitations.

"Where a proposed amendment to a complaint, consists in the addition of new matter, relating to the subject matter of the action already set out in the complaint, and is not a separate and independent cause of action, new and distinct in its nature and particulars,

the fact that the statute of limitations may have run, pending the suit, and that the defendant will not be at liberty to plead that statute in bar, is not sufficient to prevent the Court from allowing the amendment.

Bisley *vs.* Phœnix 2 Hun. (N. Y.) 349;
See also, On this point Thompson *vs.* Swearengin 48 Tex. 555;
Hastings *vs.* Kellogg 24 S. W. 846;
Recton *vs.* Alexander 27 Texas 659;
Kendall *vs.* Riley 45 Texas 20;
Jones *vs.* Burgett 46 Texas 284;
Killebrew *vs.* Stockdale 51 Texas 529;
2 & 9 Co. *vs.* Irvine 64 Texas 529.

Again an amendment is not barred by the statute of limitations, even though the amount of damages asked by the amended complaint is greater or other than that asked by the original complaint.

"Where an action has been begun within the time limited
405 by statute, an amendment may be filed after the time limited, setting up additional damages arising out of the original cause of action, and such damages may be recovered, if proved."
Cooper *vs.* Mills County 69 Iowa 350.

"If the facts set forth as a basis of recovery are the same in an original and an amended petition, though the relief prayed for in the amended pleading be different, on account of a larger measure of relief being asked for, the character of the cause of action remains the same." Held amendment not barred by statute of limitations.

Western Union Tel. Co. *vs.* Brown 62 Texas 36;
Man de Hear *vs.* Van Domseler 56 Iowa 671;
Smith *vs.* Missouri Pac. R. Co. Fed Rep. 456;
Ball *vs.* Claflin 5 Peck (Miss.) 303 all cited in
Smith *vs.* Palmer 6 Cush. (Mass.) 303.

Where the rule is clearly stated that:

"A new count, for the assertion of a right, or the enforcement of a claim growing out of the same transaction, act, agreement, or contract, upon which the original declaration is founded, *is not for a new cause of action, and may be inserted as an amendment, however different the form of liability may be.*"

"Where several covenants in one instrument are set out, but a breach of only one is alleged, an amendment alleging the breach of another or others may be allowed."

Wilson *vs.* Wideham 51 Me. 366;
Heath *vs.* Whidden 24 Me. 383;
Spencer *vs.* Howe 26 Conn. 200;
Boyd *vs.* Bartlett 36 Vt. 9;
Coxe *vs.* Tilghman 1 Whart. (Pa.) 282;
Hunt *vs.* Taylor 25 Ohio St. 620;
Harris *vs.* Wadsworth 3 Johns (N. Y.) 257.

406 It is submitted that the evidence as given under the original complaint discloses a cause af action against the defendant Ables as stated in the amended declaration annexed hereto, and that such cause of action is an implied contract arising from the circumstances that the contract sued upon in the original complaint is void through no fault of the plaintiff, but through the defendant Ables failing to get all the other parties to the express contract to ratify it, which thing he undertook to do when he made the express contract, and further through the defendant Ables failing to notify the parties to the express contract, who did not personally sign it,—that the contract had been made in their name. From this it would appear that the implied contract is practically a part of the express contract sued upon in the original complaint, and thus an amendment to enforce it is allowable and not barred by the statute of limitations.

"The object of an amendment is to supply the omissions of the original pleadings. Where the amended petition merely enlarges and states more fully and accurately the facts upon which the original petition is based, *or states an additional stipulation in the* agreement between the parties, the statute of limitations presents no impediment to the making of such an amendment *at any time during the progress of the cause.*

Thouvenin *vs.* Lea 26 Tex. 612.

407 In the proposed amendment which the plaintiff has attached hereto, the defendant Ables is the sole defendant.

If this Court thinks it necessary, the plaintiff is willing to retain any of the other defendants as defendants under an amended declaration, such as this Court might think proper. At the last trial before Judge Robinson, the plaintiff testified that the defendant Ables informed him, he intended keeping possession of the sheep and lands and parting with his interest in the Hagey Co. when the sheep and lands were transferred to him, while Ables testified he merely received the transfer of the sheep and lands on behalf of the Hagey Co.

We submit that in either event, if the agreement for breach of which this action was brought is void, Ables is alone liable to the plaintiff on a *quantum valebant,* as he had no authority to receive sheep and lands on behalf of the Hagey Co. on such terms as he received those in question.

To put a hypothetical case: Suppose a patient of the Hagey Institute at Auckland, had given to Ables two thousand pounds cash for safe keeping until he should be cured.

Suppose that Ables took the money but when he received it, said: "I shall not take this money on my own behalf, but as Secretary-Treasurer of the Hagey Co."

Suppose that afterwards this patient goes to Ables, and asks to have the money returned and Ables says: "I cannot give it to you. It was put with the funds of the Hagey Co. and spent in dividends and in conducting their business."

Can the Hagey Co. avoid liability for the repayment of the money

because Ables had no authority to make it liable for sake keeping such a sum?

And can Ables also avoid liability because he took the money as Treasurer of the Hagey Co.?

408 The plaintiff therefore submits—that a rehearing is within the language of our statute "at the trial or on appeal, or at any other stage, before or after judgment,"—he is entitled to such a rehearing in order to make the amendment proposed herein and this more especially as in most of the states and throughout the British Empire, by the Journeys Account Act, see 19 Ency. Law (2nd. Ed.) 262, the plaintiff would be able to recommence his action against the defendant Ables after the present nonsuit; but as there is no statute corresponding to the Journeys account act here, such recourse by him is barred by the statute of limitations, unless he is permitted to amend. It is also submitted that the liberal terms of our statute permitting amendments were evidently designed so that it might to a great extent relieve against the hardships imposed by the statute of limitations under similar circumstances to those under which the Journeys Account Act gives relief.

And your petitioner will ever pray etc.,

Honolulu, H. T., 18th January, 1905.

(Sg.) ROBERTSON & WILDER,
Att'ys for the Plaintiff.

(Sg.) T. M. HARRISON, *Plaintiff.*

409 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, April Term, 1905.

THOMAS MILNER HARRISON, Plaintiff,
vs.
L. C. ABLES, Defendant.

Assumpsit.

Amended Declaration.

To the Hon. J. T. De Bolt, First Judge of the Circuit Court of the First Circuit:

The undersigned, Thomas Milner Harrison, plaintiff herein, claims of L. C. Ables, a citizen of the United States of America residing in the Territory of Hawaii, defendant herein, the sum of ten thousand dollars ($10,000) with legal interest from the 1st day of October 1897, for damages resulting to him for injury done by defendant, and for cause of action alleges:

1. That prior to and on the 20th day of September A. D. 1897, the said defendant was carrying on business with others, namely J. A. Magoon, F. B. McStocker, Dorothes Emerson (Née Lamb), T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden, and Geo. D. Moore, as copartners in the Colony of New Zealand and elsewhere under the firm name or style of "The African, Pacific and Indian Hagey Company."

2. That on the date last above mentioned, at Auckland, New Zealand, aforesaid, the said defendant with his copartners T. E. Cowart, J. H. Kirkpatrick, and J. Wolfenden executed an agreement with the said plaintiff and one Alfred Edward Gilmore, a copy whereof marked (Exhibit "A") is hereto attached and made a part hereof, whereby the said defendant and his said *said* copartners in this paragraph named agreed to make the said plaintiff and the said Gilmore copartners with all the members of the said African Pacific and Indian Hagey Company named in paragraph (1) hereof for the purpose of carrying on business in the Colony of Tasmania.

3. That by clauses two and five of the said last mentioned agreement the said defendant with the said Cowart, Kirkpatrick and Wolfenden acknowledged the receipt of two thousand pounds as consideration for admitting the said plaintiff as a partner of all the said members of said African Pacific and Indian Hagey Company, mentioned in paragraph (1) hereof, for the purpose of carrying on business in the said Colony of Tasmania.

4. That the real consideration, which was acknowledged as the receipt of said two thousand pounds mentioned in paragraph (3) hereof, was the transfer by the plaintiff to the defendant, for his own use, of about six thousand sheep and an interest in certain lands in New Zealand aforesaid, the said transfer of the said sheep and interest in lands being made by an agreement executed on the 21st day of September 1897, a copy whereof marked (exhibit "B") is attached hereto and made a part hereof, between the said plaintiff and the said defendant, wherein the said sheep and interest in lands are more fully described, and by another agreement executed on the 1st day of October 1897, a copy whereof marked (Exhibit "C") is attached hereto and made a part hereof, between the said plaintiff and the said defendant and one W. C. Robison, whereby the said Robison released to the said defendant a certain interest he had in about five hundred of the said sheep, and the said plaintiff released the said Robison from certain claims he the said plaintiff had against him the said Robison.

5. That the said defendant, the said Cowart, the said Kirkpatrick and the said Wolfenden each, any, or all of them had no authority to bind the said Magoon, or the said McStocker, or the said Emerson by the terms of the said agreement, a copy whereof marked (Exhibit "A") is attached hereto, as partners of the said plaintiff or the said Gilmore, at the time the said last mentioned agreement was made.

6. That the said defendant, the said Cowart, the said Kirkpatrick or the said Wolfenden or any of them never informed the said Magoon, the said McStocker or the said Emerson, until after the 23rd day of July 1898, of all the material terms of the said last mentioned agreement.

7. That the plaintiff first informed the said Magoon, the said McStocker and the said Emerson, and each of them, of all the material terms of the said last mentioned agreement on the 23rd day of July 1898, by causing a copy of the said last mentioned agreement to be served on each of them.

8. That the said Magoon, the said McStocker and the said Emer-

son, or any of them, never ratified the said last metioned agreement.

411 9. That the said last mentioned agreement is and always has been void and the said plaintiff has never been a partner of all the members of the African Pacific and Indian Hagey Company, or a[illegible]y of them, and the consideration for which he transferred the [illegible]id sheep and his interest in the said lands to the said defendant according to the terms of the said agreements copies of which marked (Exhibit "B") and (Exhibit "C") are attached hereto, never existed and has entirely and wholly failed.

10. That the consideration of two thousand pounds, which the said plaintiff acknowledged receipt of from the said defendant by clause eight of the said agreement, a copy whereof marked (Exhibit "B") is attached hereto, was not two thousand pounds in money but the two-fifths interest in the partnership business in Tasmania mentioned and referred to in clauses two and five of the said agreement, a copy whereof marked (Exhibit "A") is attached hereto; and that the said consideration in this paragraph first above mentioned never existed and has entirely and wholly failed.

11. That whereas on the said 1st day of October 1897, at Auckland aforesaid, in consideration that the said plaintiff at the special instance and request of the said defendant transferred to the said defendant the sheep and the interest in lands described in the said agreements, copies whereof marked (Exhibit "B") and (Exhibit "C") are attached hereto, he, the said defendant undertook and then and there faithfully promised the said plaintiff to pay him so much money, together with interest thereon until the time of payment, as the said sheep and interest in lands at the said date first in this paragraph mentioned were reasonably worth, when the said defendant should be thereunto afterwards requested.

12. That the said sheep and interest in lands were reasonably worth ten thousand dollars ($10,000) on the 1st day of October 1897 when they were transferred by the said plaintiff to the said defendant.

13. That on or about the 1st day of November 1897 the said plaintiff requested the said defendant to transfer back to him the said sheep and interest in said lands, or to pay to him what the said sheep and interest in lands were reasonably worth and to

412 cancel and treat as null and void the said agreement a copy whereof marked (Exhibit "A") is attached hereto; but the said defendant neglected and refused, and still neglects and refuses, to transfer back to the said plaintiff the said sheep and interest in lands or to pay to the said plaintiff what the said sheep and interest in lands were reasonably worth, when transferred as aforesaid to the said defendant.

Wherefore the said plaintiff prays judgment against the defendant herein for said sum of ten thousand dollars ($10,000) with interest as aforesaid and costs; and asks the process of this Court to cite the said defendant to appear and answer this complaint before a jury of the country at the April 1905 Term of this Court unless otherwise sooner disposed of by judicial authority.

——— ———, *Plaintiff.*

——— ———,

Attorneys for the Plaintiff.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

Personally appeared Thomas Milner Harrison before me, who, being sworn, on oath deposes and says that the matters and things stated in the foregoing declaration are true to the best of his knowledge and belief.

Subscribed and sworn to before me this — day of —, 1905.

Notary Public, First Judicial Circuit.

413 (EXHIBIT "A.")

[N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of Agreement made this 20th day of September 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th 1897, the said partnership being composed of the following members: T. E. Cowart, J. H. Kirkpatrick and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison, both of the City of Auckland in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for alc-holism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered into the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said business and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now these presents witnesseth:

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (5000) five thousand pounds, of which the said Company shall own (11/20) eleven-twentieths, in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said

partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; and the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said part-
414 nership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedies in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine-twentieth- interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of (40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (2250) two thousand two hundred and fifty pounds mentioned in clause (2) hereof in some other district of the Company's field of operation in exchange for the portion of the said (2250) two thousand two hundred and fifty pounds taken by him, and the Company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two-fifths interest for which he has paid (2000) two thousand pounds as mentioned in clause (2) two hereof and referred to in clause (4) four hereof, and the said Gilmore a (1/20) one-twentieth interest in the said partnership for which he has paid (250) two hundred and fifty pounds as referred to in clauses (2) two and (4) four hereof.

415 6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnersh-p hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one-twentieth interest in the partnership hereby formed, for the sum of (250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sg.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Attorneys, J. H. KIRKPATRICK,
T. E. COWART.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
A. E. POWTER,
By His Att'y, T. E. COWART.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of
(Sg.) W. C. ROBISON, *N. Z.*

416 (EXHIBIT "B.")

Memorandum of agreement made the 21st day of September, 1897, between Thomas Milner Harrison and L. C. Ables, both of the city of Auckland, in the colony of New Zealand.

Whereas by agreement dated the 1st day of November, 1895, made between William Cowper Robison, sheep farmer and Lawrence Marshall Grace, Licensed Interpreter, the said Grace sold to the said Robison a temporary lease of the lands mentioned in the schedule hereto, for the sum of five hundred pounds, and whereas the said Robison after the said 1st day of November, 1895, undertook to give to said Grace a greater amount than (500) five hundred pounds for the said lease, and whereas the said Robison entered into an agreement with the said Harrison dated the 8th day of December, 1896, whereby he transferred a half interest in the said lease to the said Harrison and undertook to indemnify the said Harrison against farther charges than the said (500) five hundred pounds by the said Grace for the said lease, and whereas by the said agreement dated 8th December, 1896, the said Robison and the said Harrison entered into partnership in the possession of certain sheep grazing on the said lands, and whereas the said partnership was dissolved by an agreement dated the 4th day of May, 1897, made between the said Harrison and the said Robison, and whereas by the said agreement dated the 4th day of May, 1897, the said Harrison retained possession of about (500) five hundred head of sheep grazing on the said lands until such time as the said Robison would secure the payment of (511) five hundred and eleven pounds less the price of the wool clip of the sheep of the said partnership, and whereas the said

Harrison has been obliged to pay Freeman R. Jackson & Co., certain of the expenses of the said partnership accrued since the shearing of the said wool clip for which the said Robison is liable for one moiety thereof.

Now these presents witnesseth:

1. That the said Harrison hereby assigns to the said Ables all right, titles and interests he may have in the said temporary lease and the sheep grazing on the said lands.

2. That at last shearing of said sheep more than (3500)
417 three thousand five hundred sheep and lambs were shorn, and that since said shearing more than (2300) two thousand three hundred merino ewes and eighty long wooled rams were purchased by the said Harrison and put upon the said place.

3. That of the sheep enumerated in clause (2) two hereof not more than ten have been removed from the said place with the knowledge or consent of the said Harrison, except for consumption as mutton by the men working on said place, and the said Harrison guarantees that the said sheep and the wool clip growing thereon are free from all indebtedness except as herein mentioned.

4. That the said Harrison hereby assigns to the said Ables all indebtedness of the said Robison to him and the said Harrison.

5. That the said Ables will release the said Robison from all the said indebtedness, upon the said Robison assigning to the said Ables all interest he may have in the said temporary lease and the said sheep grazing on the said lands, and a certain promissory note for (38) thirty-eight pounds given by the said Harrison to the said Robison.

6. That the said Ables will not release the said Robison from any of the said indebtedness until the said Robison delivers to him the said note and that the said Ables on obtaining the said note will release the said Harrison from payment thereof and deliver the same to him.

7. That the said sheep are ear-marked ewes and rams or wethers reverse.

8. That in consideration of this assignment the said Ables has paid the said Harrison the sum of (2000) two thousand pounds the receipt whereof is hereby acknowledged.

THE SCHEDULE.

All those pieces or parcels of land situate in the district of Tauponuiata in the provincial district of Wellington containing 24,486 acres more or less being Tawhai South 2,000 acres, Okahukura No. 7 10,000 acres, Okahukura No. 8*b* 6,799 acres, Okahukura No. 8*c* & *d* 892 acres, Okahukura No. 8*e* & *f* 892 acres, Okahukura No. 8*g* & *h* 892 acres, Okahukura No. 8*j* & *k* & *l* 600 acres, Taurewa No. 2 500 acres and Taurewa No. 3 160 acres.

In witness whereof the said parties hereto have set their hands the 21st day of September, 1897.

(Sg.) L. C. ABLES.
(Sg.) T. M. HARRISON.

Signed in the presence of
(Sg.) J. B. DANIELS.
(Sg.) D. J. KIRKPATRICK.

418 (EXHIBIT "C.")

Memorandum of Agreement.

Agreement made this 1st day of October, 1897, between Thomas Milner Harrison and L. C. Ables, both of the city of Auckland, and William Cowper Robison, of Kihikihi.

Whereas by agreement dated 21st of September, 1897, between the said Harrison and the said Ables the said Harrison did assign to the said Ables certain claims he had against the said Robison and certain interests he had in Okahukura and other lands in West Taupo, and whereas the said Robison had certain sheep grazing on the said lands.

Now these presents witnesseth:

That the said Ables and the said Harrison release the said Robison from all claims whatsoever they may have against him.

2. That the said Robison hereby assigns to the said Ables all interest he may have in the said sheep.

3. That the said Robison hereby agrees to assign to the said Ables at any time upon the demand of the said Ables any interests he may have in the said lands.

In witness whereof the said Thomas Milner Harrison the said L. C. Ables and the said William Cowper Robison have set their hands the day aforesaid.

(Sg.) T. M. HARRISON.
(Sg.) L. C. ABLES.
(Sg.) W. C. ROBISON.

Signed in the presence of
J. H. KIRKPATRICK,
Auckland, N. Z.

Endorsed and filed Jan. 18, 1905. Geo. Lucas, Clerk.

419 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-Appellant,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES and DOROTHEA EMERSON, *née* LAMB, ET ALS., Defendants-Appellees.

Thomas Milner Harrison, the plaintiff-appellant herein, asks the permission of this Court to amend his petition for rehearing of this

cause, by calling the attention of the Court to the following important authority omitted from the said petition for rehearing.

The case referred to is McNeild *v.* Reid 9 Bing. 68; also 10 Mew's Digest 406. The syllabus of this case reads as follows: "Damages may be recovered upon an agreement by one of several partners to introduce a stranger into the firm, although the agreement be entered into without the knowledge of the firm.

"It is sufficient consideration for such an agreement, that the stranger will become a partner."

Tindall, C. J., in ruling on this case said: "Three objections have been made to the plaintiff's right to retain his verdict:—First, that no action lies on the contract disclosed by the evidence in this cause; and that objection divides itself into two considerations,—one, that the plaintiff was aware of the fact that others persons were already in partnership with the defendant, consequently that the defendant could not, without the consent of such persons, force a stranger into the firm; and that the plaintiff cannot seek to enforce a contract which at the time he knew to be impossible. But this is no answer in the mouth of the defendant; for he should have secured the consent of his partners before he ventured to enter into such a contract; or is bound, at all events, to obtain it afterwards."

Bosanquet J.: "I think this verdict ought not to be disturbed. It is objected, that the contract is of such a nature that the defendant could not perform it without the consent of his partners; but that does not discharge the defendant from his contract, for he ought not to have engaged in it unless he had secured that consent."

(Sg.) T. M. HARRISON, *Plaintiff.*

Endorsed and filed Jan. 24, 1905. George Lucas, Clerk.

420 Supreme Court of the Territory of Hawaii, October Term, 1904.

T. M. HARRISON
v.
J. A. MAGOON ET AL.

HONOLULU, MONDAY, *February* 20, 1905.

Clerk's Minutes.

Motion for Rehearing.

Before Frear, C. J.; Hartwell, J., and Circuit Judge De Bolt.

T. M. Harrison appeared for the Plaintiff and Kinney, McClanahan & Cooper and S. H. Derby for the defendants.

Mr. Harrison reads motion for re-hearing and argues.

Mr. Derby argues.

Mr. Harrison replies.

The Court takes the matter under consideration.

(Sg.) GEORGE LUCAS, *Clerk.*

421 T. M. HARRISON

v.

J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA EMERSON, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFERDEN, and G. D. MOORE.

Petition for Rehearing.

Argued February 20, 1905; Decided March 6, 1905.

Frear, C. J., Hartwell, J., and Circuit Judge De Bolt in Place of Wilder, J.

REHEARING—*denied the petition therefor being based on misapprehension of former decision.*—A rehearing is denied where the court based its former decision on the ground that the contract sued on was incomplete, and not, as contended, on the ground that it was not several as well as joint, or that, if it was only joint, a recovery could not be had against such of the parties thereto as had undertaken without due authority to bind all.

AMENDMENT—*by appellate court, no error being found in judgment below.*—Although the statute permits amendments to be made after judgment and on appeal, and amendments should be allowed more freely when, as in this case, a new action would be barred by the statute of limitations, this court should
422 not allow the plaintiff an amendment which would be ineffective without a new trial and then arbitrarily reverse the judgment below and grant a new trial in order to make the amendment effective, when no error is found in the judgment below.

Opinion of the Court by FREAR, *C. J.*

This is a petition for a rehearing of the case reported ante, p. 332. It is based upon two grounds. The first is that at the original hearing the plaintiff, who is the petitioner, relied upon the ruling made in this case in 13 Haw. 360, that the contract sued on was joint and several, and argued that if the contract was joint and not joint and several, and some of those purporting to join in the contract were not liable, a recovery could be had against such of them as had undertaken without due authority to bind all jointly, whereas the court, as it is contended, reconsidered the former ruling and held that the contract was joint, and not joint and several, and overlooked the argument that even though it was joint a recovery could be had against some of the parties thereto if not against all. This ground is based upon a misapprehension of the view that the court took in its recent decision and which is set forth, clearly as it seems to us, on pages 338 and 339, ante. That decision was based on the ground that the contract sued upon was incomplete, whether it was joint and several or only joint in form. Among other things the court said, on page 339:

"An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any of them unless all execute or subsequently ratify the agreement." It was also pointed out in that decision that the court, as it was constituted when the ruling was made that the contract was joint and several, considered it still an open question whether the contract was complete or not. With reference to this the court in its recent decision (page 338), referring to the earlier decision, used this language:

"In denying the plaintiff's motion for a rehearing of the decision sustaining the demurrer the court said: 'Whether or not if it
423 shall appear hereafter that some of the persons named as defendants neither executed nor subsequently ratified the execution of the agreement, the others can still be held jointly liable, * * * are questions which have not yet arisen and upon which no opinion is expressed.' 14 *Ib.* 532. The court evidently had in mind the question whether the agree-ent would be complete unless all signed or ratified."

The second ground relied upon for a rehearing is that, even if the first ground should not be sustained, a rehearing should be had for the purpose of allowing the plaintiff to amend his complaint and then have a new trial. The amendment proposed is one by which the case would be changed from an action against all the present defendants upon the special contract, or for a breach of that contract, based on the failure of the company to give the plaintiff, upon his dissatisfaction with the condition of the partnership business in Tasmania, stock of the value of £2,000 in some other district of the company's field of operation, in exchange for his inter-st in the company represented by £2,000 recited to have been paid in by him, to an action against the defendant Ables for the value of about 6,000 head of sheep and an interest in certain land, which in fact, instead of the £2,000 recited, was turned over by the plaintiff to the said case, a new action would be barred by the statute of limitations.

It is urged that this amendment may be allowed now by this court under the broad provision of the statute relating to amendments (Revised Laws, Sec. 1738) and under the view expressed in Dowsett v. Jones, 9 Haw. 543, and the cases there cited, to the effect that an amendment should be more freely allowed when, as in the present case, a new action would be barred by the statute of limitations.

We regret that we cannot take this view. It is true that the statute is broad and that it expressly permits amendments of certain kinds after as well as before judgment, but this does not mean that in addition to allowing an amendment the court may, at it would have to do in this case in order to make the amendment effective, re-
424 verse the judgment of nonsuit below and order a new trial when no error is found in the judgment below. If that judgment had been reversed and a new trial ordered, the court might also grant leave to amend before the new trial should be had. Likewise if the amendment were merely to conform the complaint to the proof, or otherwise was designed to support the judgment below, it might be allowed here, and of course, in such case, it would be

effective without reversing the judgment below or ordering a new trial. The difficulty is that no error has been found in the judgment below, and in the absence of error that judgment cannot be reversed merely for the purpose of allowing an amendment and making it effective. This is the view generally taken elsewhere. For instance, in Sutter *v.* San Francisco, 26 Cal. 112, in which a similar proposition was made, the court said:

"The appeal is from the judgment, and we find no error to vitiate it. We hold that the court committed no error, so far as the record shows its action, and that the judgment is in all respects legal. We cannot, therefore, reverse it, for we find no error to justify such action, and plaintiff cannot now amend, because there is a valid final judgment; and there is nothing more to be done, without first reversing this judgment. It would be an anomaly in legal proceedings to hold the judgment in all respects correct, and then arbitrarily reverse it."

To the same effect, see People *v.* Jackson, 24 Cal. 630; Gibbons *v.* Scott, 15 Cal. 285; Colorado Springs Co. *v.* Hopkins, 5 Colo. 338; Denison *v.* Tyson, 17 Vt. 549.

Most of the cases cited contra by the plaintiff are not in point. The case of Balcom *v.* Woodruff, 7 Barb. 13, however, is somewhat in point, for in that case the statute was almost identical with ours and the statute of limitations would have barred a new action, although other circumstances in the case were somewhat different from those in this case. The court there allowed an amendment *nunc pro tunc*, and then, without finding error in the judgment of nonsuit below, set aside that judgment and ordered a new trial in order to make the amendment of avail to the plaintiff. In support of this course
425 the court cited an earlier case in the same jurisdiction (Holmes *v.* Seely, 17 Wend. 75), but said:

"This relief, however, is granted under the peculiar circumstances of this case, and the case is not to be made a precedent. The general rule is that a party who has not applied for an amendment until he has been nonsuited, is too late to ask for a new trial, in addition to an amendment."

In that case, it may be added, the plaintiff had moved in the lower court for leave to amend and for a new trial, as well as to set aside the judgment of nonsuit.

A rehearing is denied.

The plaintiff in person, *Robertson & Wilder* also for the plaintiff. *J. A. Magoon; J. Lightfoot; Kinney, McClanahan & Cooper*, and *S. H. Derby for defendants.*

(Sg.) W. F. FREAR.
(Sg.) ALFRED S. HARTWELL.
(Sg.) J. T. DE BOLT.

426 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-Appellant,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, GEORGE D. MOORE and J. WOLFENDEN, Defendants-Appellees.

To the Honorable the Judges of the Supreme Court of the Territory of Hawaii:

Comes now the above named Plaintiff-appellant, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause becoming final therein on the 6th day of March, A. D. 1905, manifest error hath happened to the great damage of said Plaintiff-appellant.

Wherefore, said Plaintiff-appellant prays for the allowance of a Writ of Error, and for an order fixing the amount of bond for costs and fees, in said cause, and for such other orders and process as may cause the same to be corrected by the Honorable the Supreme Court of the United States.

Dated Honolulu, T. H., 26th May, A. D. 1905.

(Sg.) T. M. HARRISON,
Plaintiff-in-error.

(Sg.) CASTLE & WITHINGTON,
Attorneys for the Plaintiff-in-error.

Endorsed: T. M. Harrison *vs.* J. A. Magoon, *et als.* Petition for Writ of Error. Filed June 6, 1905. Henry Smith, Clerk. Castle & Withington, Att'ys for Pl-ff.

427 In the Supreme Court of the United States.

THOMAS MILNER HARRISON, Plaintiff in Error,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, GEO. D. MOORE, A. E. POWTER, and J. WOLFENDEN, Defendants in Error.

In Error to the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes the plaintiff-in-error in the above entitled cause and says, that in the record of the proceedings in said cause in the Supreme Court of the Territory of Hawaii there is manifest error, in this, to wit:

1. That there was error in overruling the exceptions by the plaintiff-in-error to the refusal of The Circuit Court of the First Judicial Circuit of the Territory of Hawaii, to consider the merits of the

Motion for New Trial duly presented to the said Circuit Court; and to the Dismissal by the said Circuit Court of the said Motion for New Trial.

2. That there was error in overruling the exception of the plaintiff-in-error to the nonsuit as to all or any of the defendants-in-error rendered in said Circuit Court, and in not reversing the judgment and ordering a new trial in said Circuit Court as to each and all of the defendants-in-error.

3. That there was error in overruling the exception of the plaintiff-in-error to the nonsuit as to the defendant-in-error Ables, and in not reversing said nonsuit as to the said Ables and ordering a new trial in said Circuit Court as to him.

4. That there was error in overruling the exception of the plaintiff-in-error to the nonsuit as to the defendants-in-error other than Magoon, McStocker and Emerson, and in not reversing said nonsuit as to the defendants-in-error other than Magoon, McStocker and Emerson and ordering a new trial as to said defendants-in-error other than Magoon, McStocker and Emerson.

428 5. That there was error in holding that there was no evidence to go to the jury to prove that the defendants-in-error, Magoon, McStocker and Emerson, were bound by the agreement declared on, or had ratified the same.

6. That there was error in deciding that the said agreement declared on is not joint and several; and that the said agreement was incomplete and ineffective and the nonsuit properly ordered upon the "failure of the plaintiff" to prove that "all of the defendants executed or ratified the agreement declared on," when the law of the case as laid down by the said Supreme Court of the Territory of Hawaii in its decision rendered herein on demurrer on 10th April, 1901, (13 Hawaiian Reports 360) holds: "The agreement sued on (quoting from it) 'witnesseth; for and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated,' and then goes on to specify the details of the contract. As we construe this clause, it is in effect as though the language used had been, that for the consideration stated 'the parties of the first part do hereby, jointly and severally, make, with the parties of the second part, the following agreement of partnership.' The contract made in the opening clause by the parties of the first part is joint and several, and the contract there made is that the details of which are specified in the succeeding clauses. If paragraph 4 stood entirely by itself, it would probably be construed to mean that the members of the 'company' jointly were liable for the promise there set forth to give Harrison certain stock upon the happening of a certain contingency. The paragraph, however, cannot, we think, be read by itself; it must be read in connection with the opening sentence above quoted, and if so understood the result is the finding that the promise in question was a joint and several obligation on the part of the members of the company."

429 7. That there was error in refusing to consider the exceptions of the plaintiff-in-error to the rulings of the said Circuit Court as to the admission and rejection of evidence.

8. That there was error in refusing to consider the exception of the plaintiff-in-error to the order of the said Circuit Court excluding the evidence of the plaintiff-in-error as to his knowledge of the whereabouts of the defendant-in-error Ables after 10th March, 1898, and before the said Ables was served with a Summons at Honolulu, Hawaii, about 23rd July, 1898, from the Supreme Court of New Zealand in an action brought by the plaintiff-in-error against the defendants-in-error on the agreement declared on.

9. That there was error in neglecting to order a new trial in said Circuit Court with leave to the plaintiff-in-error to amend his declaration so that he might sue for the value of the sheep and lands conveyed as consideration for the agreement declared on as for a *quantum valebant* or *quantum meruit,* because the said plaintiff-in-error was taken by surprise in that he could not expect it to be held that the agreement declared on was not joint and severa., and, therefore, incomplete and ineffective.

(Sg.) T. M. HARRISON,
Plaintiff-in-error.

(Sg.) CASTLE & WITHINGTON,
Attorneys for the Plaintiff-in-error.

Endorsed: T. M. Harrison *vs.* J. A. Magoon *et als.* Assignment of Errors. Filed June 6, 1905. Henry Smith, Clerk. Castle & Withington, Att'ys for Plaintiff.

430 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-Appellant,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, and GEORGE D. MOORE, Defendants-Appellees.

Upon application of the Plaintiff-appellant herein, and upon filing a petition for a Writ of Error and an Assignment of Errors, it is ordered that a Writ of Error be and hereby is allowed to have reviewed in the Supreme Court of the United States, the judgments hereinbefore entered herein; and that the amount of bond on said Writ of Error be, and hereby is, fixed at $500.00.

Honolulu, T. H. June 6, 1905.

(Sg.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: T. M. Harrison *vs.* J. A. Magoon *et als.* Order Allowing Writ of Error. Filed June 6, 1905. Henry Smith, Clerk. Castle & Withington, Att'ys for Plaintiff.

431 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-in-Error,

vs.

J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, GEO. D. MOORE, A. E. POWTER, and J. WOLFENDEN, Defendants-in-Error.

Bond on Appeal.

Know all men by these presents: That we, Thomas Milner Harrison, W. R. Castle and D. L. Withington, all of the City of Honolulu, on the Island of Oahu in the Territory of Hawaii, are held and firmly bound unto the above named, J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, Geo. D. Moore, A. E. Powter and J. Wolfenden in the sum of five hundred dollars, to be paid to the said J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, Geo. D. Moore, A. E. Powter, and J. Wolfenden, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated the 6th day of June in the year of our Lord one thousand nine hundred and five.

Whereas the above named Thomas Milner Harrison has prosecuted an appeal to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit, by the Supreme Court of the Territory of Hawaii:

Now, therefore, the condition of this obligation is such, that if the above named Thomas Milner Harrison shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Sg.) T. M. HARRISON. [SEAL.]
(Sg.) W. R. CASTLE. [SEAL.]
(Sg.) D. L. WITHINGTON. [SEAL.]

Approved by
(Sg.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: T. M. Harrison *vs.* J. A. Magoon *et als.* Bond on Appeal. Filed June 6, 1905. Henry Smith, Clerk. Castle & Withington, Attorneys for Plaintiff-in-error.

432 In the Supreme Court of the United States.

THOMAS MILNER HARRISON, Plaintiff-in-Error,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, GEO. D. MOORE, and J. WOLFENDEN, Defendants-in-Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii; before you, or some of you, being the highest Court of law or equity of the said Territory of Hawaii, in which a decision could be had in the said suit, between, Thomas Milner Harrison, Plaintiff-Appellant, and Plaintiff-in-error, and J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden and Geo. D. Moore, Defendants-Appellees, and Defendants-in-error, wherein the matter in dispute exceeds the sum of Five Thousand Dollars, a manifest error hath happened, to the great damage of the said Thomas Milner Harrison, Plaintiff-in-error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so
433 that you may have the same at Washington on the 13th day of September next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 14th day of August A. D. 1905.

(Sg.) HENRY SMITH,
[SEAL.] *Clerk of the Supreme Court of the Territory of Hawaii.*

Allowed by:
(Sg.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

434 In the Supreme Court of the United States.

THOMAS MILNER HARRISON, Plaintiff-in-Error,
vs.
J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEO. D. MOORE, Defendants-in-Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden and Geo. D. Moore, and Messrs. Kinney, McClanahan and Cooper, Attorneys for J. A. Magoon, F. B. McStocker, Dorothea Emerson and L. C. Ables:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Thomas Milner Harrison is Plaintiff-in-error, and you are Defendants-in-error, to show cause, if any there be, why the judgment rendered against the said Plaintiff-in-error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this fourteenth day of August in the year of Our Lord one thousand nine hundred and five.

(Sg.) W. F. FREAR,
[SEAL.] *Chief Justice of the Supreme Court of the Territory of Hawaii.*

(Endorsed:) In the Supreme Court of the United States. T. M. Harrison *vs.* J. A. Magoon *et al.*. Writ of Error & Citation. Filed Aug. 14th, 1905. Henry Smith, Clerk. Castle & Withington, Attorneys for Plaintiff in Error.

Service of a copy of the within Writ of Error and Citation Admitted this 14th day of August, 1905.

J. ALFRED MAGOON,
J. LIGHTFOOT,
Attorneys for the Defendants in Error.
KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

435 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-in-Error,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, GEO. D. MOORE, and J. WOLFENDEN, Defendants-in-Error.

UNITED STATES OF AMERICA, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the foregoing pages, numbered from 1 to 434, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Thomas Milner Harrison, Plaintiff-appellant and Plaintiff-in-error, against J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, Geo. D. Moore and J. Wolfenden, Defendants-appellees and Defendants-in-error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Honolulu in the Territory of Hawaii, this 15th day of August, in the year of Our Lord, one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

[Seal Supreme Court Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 19,890. Territory of Hawaii supreme court. Term No. 107. Thomas Milner Harrison, plaintiff in error, *vs.* J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden, and George D. Moore. Filed August 30, 1905. File No. 19,890.

Office Supreme Court, U. S.
FILED.
DEC 10 1906
JAMES H. McKENNEY,
CLERK

No. 107

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR THE PLAINTIFF-IN-ERROR.

W. R. CASTLE,
D. L. WITHINGTON,
A. G. M. ROBERTSON,
For the Plaintiff-in-Error.

INDEX.

PAGES

STATEMENT OF CASE 1
The Facts 1
The Pleadings 9
The Trials 10
The Errors 14

ARGUMENT 16
I. *The Agreement was within the Scope of the Partnership Business* 16
II. *The Agreement was Ratified by all the Partners* 22
(a) They ratified it by receiving the 18% dividend 22
(b) They ratified it when they received the Summons from New Zealand 26
III. *The Plaintiff is entitled to have all The Issues Submitted to the Jury* 30
IV. *The Agreement is Joint and Several* 30
(a) It is the Law of the Case 30
(b) It was the Intention of the Parties 31
(c) Such is the Construction by the Courts 32
(d) Naming members of Partnership in Contract makes it Joint and Several 35
V. *Ables was liable for breach of the Agreement. Partners Signing Without Authority are Personally Liable* 36
(a) Ables was Liable for Breach of the Agreement 36
(b) Partners signing without Authority are Personally Liable .. 44
(c) In a Suit against a Partnership Judgment may be had against the partners Liable 45
(d) A mistake of Law does not Relieve from Liability 49
(e) Under the Statutes of Hawaii in a Suit against Partners on a Joint and Several Liability Judgment may be had against those liable 49
(f) Ables was duly notified of Plaintiff's dissatisfaction 53
VI. *Plaintiff is Entitled to Amend his Complaint and Recover on a Quantum Valebant* 55
(a) He is entitled to amend if there was no Error in the judgment below 55
(b) There was error in the judgment below, he is, therefore, entitled to amend 59
VII. *The Fact that the Supreme Court of Hawaii Ostensibly Refused to Consider the Exceptions Taken at the Trial Furnishes no reasons for This Court to Refuse to Consider the Errors now Assigned* 63

PAGES

(a) The judgment should be reversed because the trial Court did not consider it had power to order a New Trial... 63

(b) Since the action of the trial Court in granting the non-suit was reviewed by the Appellate Court on a proper Bill of Exceptions, this Court will review the judgment of the Appellate Court, although it professed to review a Motion for New Trial only..... 64

(c) The judgment of the trial Court did not become final for purposes of appeal until the Motion for New Trial was disposed of..... 67

(d) A Writ of Error was the proper method of review..... 72

CASES CITED.

PAGES

A.

PAGES

Abbott v. Chambers, 55 Mich. 410 56
Adams v. Bean, 13 Mass. 137 38
Adams v. Fisher, 75 Tex. 657:6 S. W. 772 61
Ah Lep v. Gong Choy & Long Wing, 13 Ore. 205:9 Pac. 483 46
Alexander v. Worthington, 5 Ind. 471 61
Allen v. Clayton, 11 Fed. 73 45
Allin v. Shadburne, 1 Dana (Ky.) 68:25 Am. Dec. 121 41
Andrews v. Schoppe, 84 Me. 170:24 Atl. 805 20
Armijo v. Armijo, 181 U. S. 558:45 L. 1000 72
Aspen M. S. S. Co. v. Billings, 150 U. S. 31:37 L. 986 71
Atlantic &c. R. Co. v. Laird, 164 U. S. 393:41 L. 485 45

B.

Bailey Loan Co. v. Hall, 110 Cal. 490 46
Bank of Metropolis v. Kennedy, 17 Wall. (U. S.) 19:21 L. 544 49
Bank of Monongahela Valley v. Weston, 159 N. Y. 201:54 N. E. 41 25
Bank of Poughkeepsie v. Ibbotson, 24 Wend. (N. Y.) 473 and 5 Hill 461 34
Balcom v. Woodruff, 7 Barb. (N. Y.) 14 ..... 58, 62, 63
Ball v. Clafin, 5 Peck. (Miss.) 303 57
Baltimore Elec. R. Co. v. Gibson, 41 Ohio St. 145 56
Baltimore & O. R. Co. Ex Parte, 108 U. S. 566:27 L. 812 72
Bell v. Cunningham, 3 Pet. (U. S.) 69 25
Bell v. Teague, 85 Ala. 211:3 So. 861 48
Benedict et al. v. Davis, 2 McLean (U. S.) 347; Fed. Case 1293 53
Bennett v. Jackson, 34 W. Va. 62:11 So. 734 62
Benton v. Benton, 63 N. H. 289:56 Am. Rep. 512 20
Bibb v. Allen, 149 U. S. 481:37 L. 819 53
Bisley v. Phoenix, 2 Hun. (N. Y.) 349 57
Boon v. Aetna Ins. Co., 12 Blatchf. (U. S.) 24:3 Fed. Case 1639 20
Boyd v. Bartlett, 36 Vt. 9 57
Bridgeforth v. Gray, 39 Miss. 136 61
Brittain v. Work, 13 Neb. 347:14 N. W. 421 38
Brockett v. Brockett, 2 How. (U. S.) 238:11 L. 251 71
Bruns v. Schreiber, 48 Minn. 366 56
Bryce v. Massey, 35 S. C. 127:14 S. E. 768 56
Buckingham v. Hanna, 20 Ind. 110 21
Buckmaster v. McElroy, 20 Neb. 557:31 N. W. 76:57 Am. Rep. 843 35
Burnham v. Spooner, 10 N. H. 165 56

C.

Caldron v. Atlas Steamship Co., 170 U. S. 280:42 L. 1033 32
Carter v. Moulton, 51 Kan. 9:32 Pac. 633 38
Case v. Blood, 71 Iowa 632 56

PAGES

Cassidy v. Saline County Bank, 14 Okl. 532:78 Pac. 324..... 30
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226:41 L. 979..... 65
Chicago Elec. R. Co. v. Bills, 118 Ind. 221:20 N. E. 775..... 56
Chouteau v. Suydam, 21 N. Y. 180.....38, 39
Clafin v. Butterly, 2 Abb. Pr. 446:5 Duer (N. Y.) 327..... 46
Congdon v. Monroe, 51 Texas 109..... 51
Cook v. Tullis, 18 Wall. (U. S.) 332:21 L. 933..... 29
Cooper v. Schwartz, 40 Wis. 54..... 27
Copeland v. Johnson Mfg. Co., (Supreme Court) 3 N. Y. Supp. 42.... 56
Coxe v. Tilgham, 1 Whart. (Pa.) 282..... 57
Cox v. McLaughlin, 76 Cal. 60..... 56
Cruse v. Jones, 71 Tenn. (3 Lea.) 66..... 48
Cutter v. Whittemore, 10 Mass. 442..... 39

D.

Dance v. McClure, 39 Vt. 196..... 56
Dean v. Savage, 28 Conn. 359.....46, 49, 54
Dowling v. National Bank of Boston, 145 U. S. 512:36 L. 795....17, 45, 47
Dowsett v. Jones, 9 Haw. 543.....52, 63

E.

Elkenberry v. Edwards, 67 Iowa 14:24 N. W. 570..... 26
Ely v. Early, 94 N. Car. 1..... 56
Emerson Talcott Co. v. Knapp, 90 Wis. 34:62 N. W. 945..... 33
Evanston v. Gunn, 99 U. S. 665:25 L. 306..... 20
Evans v. Warner, 21 Hun. (N. Y.) 574..... 56

F.

Farmers Co-operative Trust Co. v. Lloyd, 47 Ohio 525:26 N. E. 110, 21 Am. St. Rep. 846:12 L. R. A. 346..... 48
Farmers' & Merchants' Bank of Elk Creek v. Farmers' & Merchants' Bank of Auburn, 49 Neb. 379:68 N. W. 488..... 29
Fearns v. Tiernan, 4 Rob. 367..... 43
Firth v. Thrush, 8 B. & C. 387:15 E. C. L. 242..... 55
Fleishman v. Ver Does, 111 Iowa 322:82 N. W. 757..... 28
Florida Cent. R. Co. v. Schutte, 103 U. S. (13 Otto) 118:26 L. 327.... 61
Forst v. Leonard, 112 Ala. 296:20 So. 587..... 35
Fredenhall v. Taylor, 23 Wis. 538:99 Am. Dec. 203..... 48

G.

Garden v. Warren, 52 Mich. 309:17 N. W. 853..... 26
Garrett v. Carter, 42 Pa. St. 143..... 26
Gibson v. Chouteau, 7 Mo. App. 1..... 60
Gidionsen v. Union Depot R. Co., 129 Mo. 401..... 61
Given v. Hilton, 95 U. S. 591:24 L. 458..... 20
Goddard v. Hapgood and Trustees, 25 Vt. 351:60 Am. Dec. 272..... 33
Goldsmith v. Sachs, 17 Fed. 726..... 36
Guthiel v. Gilmer, 27 Utah 496:76 Pac. 628..... 25

H.

PAGES

Haldane v. United States, 69 Fed. 819 20
Hall v. Crandall, 29 Cal. 567:89 Am. Dec. 64 48
Harrington v. Higham, 15 Barb. (N. Y.) 524 ..... 45, 47, 50
Harrison v. Magoon, 14 Haw. 418, 530 ..... 24, 29, 31, 53
Harris v. Wadsworth, 3 Johns (N. Y.) 257 57
Hastings v. Kellogg, (Tex. Civ. App) 24 S. W. 846 57
Hastings v. Lovering, 2 Pick. (Mass.) 214:13 Am. Dec. 420 48
Hawley v. Smith, Ind. 183 61
Heath v. Whidden, 24 Me. 383 57
Heath v. Whidden, 29 Me. 108 56
Heeia Sugar Co. v. McKeague, 5 Haw. 101 ..... 63, 64
Hegeman v. Johnson, 35 Barb. (N. Y.) 200 48
Helliker v. Francisco, 65 Mo. 598 35
Henderson v. Martin, 19 Ark. 477:10 Am. Dec. 606 18
Henderson v. Moore, 5 Cranch (U. S.) 11:3 L. 22 64
Hewitt v. Roudebush, 24 La. Ann. 254 48
Hiatt v. Brooks, 17 Neb. 33:22 N. W. 73 61
Hinsdale v. Partridge, 14 Vt. 547 48
Holmes v. Seely, 17 Wend. (N. Y.) 75 59
Hull v. Brown, 35 Wis. 654 48
Hunt v. Taylor, 25 Ohio St. 620 57

I.

Illinois v. Illinois C. R. Co., 184 U. S. 77:46 L. 440 61
Irwin v. Williar, 110 U. S. 499:28 L. 225 ..... 17, 47

J.

Jewett v. R. R., 10 Ind. 539 21
Johnston v. Milwaukee & W. Inv. Co., 49 Neb. 68:68 N. W. 383 ..... 18, 28
Jones v. Meehan, 175 U. S. 1:44 L. 49 58

K.

Kaimiola v. Beni, 5 Haw. 294 61
Kamohai v. Kahele, 3 Haw. 530 63
Keigher v. Dowler, 47 Minn. 540:50 N. W. 823 47
Kendall v. Almy, 2 Sumn. (U. S.) 278:14 Fed. Case 7690 20
Kerr v. Clampitt, 95 U. S. 188:24 L. 493 66
Kingham & Co. v. Western Mfg. Co., 170 U. S. 675:42 L. 1192 ..... 71, 72
Kingham v. Spurr, 7 Pick. (Mass.) 235 43
Kingsland & Douglas Mfg. Co. v. Mitchell, (Tex. Civ. App.) 36 S. W. 757 ..... 46, 52
Kuhn v. Brownfield, 34 W. Va. 252:12 S. E. 519 56

L.

Landykowski v. Lark et al., 108 Mich. 500:66 N. W. 371 48
Leader v. Plante, 95 Me. 343:50 Atl. 53 44
Lewis v. Clarkin, 18 Cal. 399 48
Lewis v. Read, 13 M. & W. 834 25
Libley v. Young, 26 S. Car. 415 56
Link v. Allen, 48 Tenn. (1 Heisk.) 318 46
Los Angeles v. Mellus, 59 Cal. 444 39
Louisville R. R. Co. v. County Act, 33 Tenn. (1 Sneed) 637:62 Am. Dec. 424 61

M.

PAGES

Man de Hear v. Van Domseler, 56 Iowa 671 57
Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 255 34
Marks v. Bard, 1 Abb. Pr. 63:8 Howard Pr. 151 46
Marx v. Goodenough, 23 Ore. 545:32 Pac. 511 44
Mason v. Connell, 1 Whartons' Reports (Pa.) 381 29
Mathewson v. Clarke, 6 How. (U. S.) 122:12 L. 370 43
Mathews v. Jenkins, 80 Va. 463 48
Mattoon v. Barnes, 112 Mass. 463 38
Mattox v. United States, 146 U. S. 140:36 L. 917 64
Mayor of Nashville v. Ray, 19 Wall. (U. S.) 468:22 L. 164 27
May v. Haalelea, 2 Haw. 191 63
McGahan v. National Bank of Ronduot, 156 U. S. 218:39 L. 403 24
McGowan v. American Pressed Tan Bark Co., 121 U. S. 575:30 L. 1027 54
McGuire v. Drew, 83 Cal. 225 62
McNeild v. Ried, 9 Bing. 68:10 Mew's Digest 406 ..... 45, 49, 54
Meadow Co. v. Christ Church, 15 N. J. 52, 59
Meech v. Smith, 7 Wend. (N. Y.) 315 48
Meisser v. Thompson, 9 Ill. App. 370 33
Merrick v. Brainard, 38 Barb. (N. Y.) 574 43
Meyer v. Richmond, 172 U. S. 82:43 L. 374 65
Miller v. Fletcher, 27 Gratt. (Va.) 403:21 Am. Rep. 356 40
Missouri K. & T. R. Co. v. Elliott, 184 U. S. 530:46 L. 673 65
Missouri K. & T. R. Co. v. Haber, 169 U. S. 613:42 L. 878 66
Montana Ry Co. v. Warren, 137 U. S. 348:34 L. 681 66
Montpelier Sav. Bank & Trust Co. et al. v. City of Montpelier, 73 Vt. 364:50 Atl. 1117 34
Moore v. Otis, 18 Mo. 118 46
Moore v. Williams, 31 Tex. Civ. App. 287:72 S. W. 222 51
Moss v. Riddle, 5 Cranch, (U. S.) 351:3 L. 123 40
Myers v. Kirt, 68 Iowa 124 57

N.

Neimeyer Lumber Co. v. Moore, 55 Ark. 245:17 S. W. 1028 25
Nelson v. Ayres, 11 N. J., L. 62 59
Newcomb v. Wood, 97 U. S. 581:24 L. 1085 64
Nichols, Shephard & Co. v. Shaffer, 63 Mich. 599:30 N. W. 383 25
Noonan v. Nunan, 76 Cal. 44 43
Northern Pacific R. Co. v. Holmes, 155 U. S. 137:39 L. 99 71

O.

Oliver et al. v. Piatt, 3 How. (U. S.) 333:11 L. 622 24

P.

Parker v. Bradley et al, 2 Hill (N. Y.) 584 39
Pawling v. U. S., 4 Cranch (U. S.) 219:2 L. 601 38
Peabody v. Damon, 16 Haw. 451 30
Pennsylvania Co., Ex Parte, 137 U. S. 451:34 L. 738 72
People v. Doty, 80 N. Y. 225 33
Pepper v. State, 22 Ind. 399 41
Perkins v. Booth, 71 Me. 94 26
Perkins v. Smith, 116 N. Y. 441 35
Perrin v. Keen, 19 Me. 355 ..... 27, 56

PAGES

Pickering v. Lomax, 145 U. S. 310:36 L. 716..... 29
Pierce v. Wood, 23 N. H. 519..... 56
Pittsburg & R. Co. v. Keokuk Bridge Co., 131 U. S. 381:33 L. 160..... 27

R.

Railway Co. Ex Parte, 103 U. S. 794:26 L. 461..... 72
Recton v. Alexander, 27 Tex. 659..... 57
Re Sanford Fork & Tool Co., 160 U. S. 247:40 L. 414..... 60
Roberts v. Button, 14 Vt. 195..... 48
Rodrigue v. Currier, 15 S. & R. (Pa.) 81..... 56
Roger v. Kneeland, 10 Wend. (N. Y.) 218..... 26
Roggenkamp v. Hargreaves, 32 Neb. 540..... 46
Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47..... 61
Rolling Mill v. St. Louis & C. R. R. Co., 120 U. S. 260:30 L. 641..... 27
Rowland v. Phalen, 14 N. Y. Super. Ct. (1 Bosw.) 43..... 48
Russ v. Hansen, 119 Iowa, 375:93 N. W. 502..... 27
Ryan v. Cooke, 172 Ill. 309:50 N. E. 213..... 39

S.

Sandyskowski v. Lark et al., 108 Mich. 500:66 N. W. 371..... 35
Sawin v. Kenny, 93 U. S. 289:23 L. 926..... 45
Seaver v. Colburn, 10 Cush. (Mass.) 324..... 48
Sewall v. Allen, 6 Wend. (N. Y.) 333..... 34
Sharpstein v. Friedlander, 63 Cal. 78..... 61
Sherman v. Harrison, 7 Haw. 664..... 63
Sibbard v. United States, 12 Pet. (U. S.) 488:9 L. 1167..... 60
Simpkins v. Simpkins, 14 Mont. 386:36 Pac. 759..... 62
Smith v. Bellows, 77 Pa. St. 441..... 57
Smith v. Hamakua Mill Co., 15 Haw. 655..... 30
Smith v. Missouri Pac. R. Co., 56 Fed. 458..... 56
Smith v. Palmer, 6 Cush. (Mass.) 303..... 56
Smith v. Straub, 41 Kan. 7:20 Pac. 516..... 46
South v. Maryland, 18 How. (U. S.) 396:15 L. 433..... 20
Spencer v. Howe, 26 Conn. 200..... 57
State v. Potter, 63 Mo. 212:21 Am. Rep. 440..... 38
Stedeker v. Bernard, 102 N. Y. 327..... 46
Steele v. McElroy, 33 Tenn. (1 Sneed) 341.....35, 48
Stephen v. Thompson, 28 Vt. 77..... 56
Stevenson v. Mudgett, 10 N. H. 336..... 56
Stokes v. Mackay, 140 N. Y. 640..... 26
Sumners v. Spyback, 1 Kan. 294..... 34
Sweeney v. Lomme, 22 Wall. (U. S.) 208:22 L. 727..... 72

T.

Tabb v. Gist, 23 Fed. Case, 13719:6 Call. 276: 1 Brock 33..... 24
Table Mt. Tunnel Co. c. Stranahan, 21 Cal. 548..... 61
Taft v. Church, 162 Mass. 527:39 N. E. 283..... 46
Taylor v. Matteson, 86 Wis. 113:56 N. W. 829..... 43
Taylor v. Shelton, 30 Conn. 122..... 48
Telffner v. Dillard, 70 Tex. 140..... 56
Testa v. Kohahawai, 12 Haw. 254..... 52
Texas & R. R. Co. v. Anderson, 149 U. S. 237:37 L. 717..... 60
The Swallow, Fed. Case 1366 (Olcott) 334..... 45
Thomas v. West Jersey R. R. Co., 101 U. S. 71:25 L. 950..... 20
Thompson v. Swearengin, 48 Tex. 555..... 57
Trask v. Duval, 24 Fed. Case 14143 (4 Wash. U. S. 97)..... 59

PAGES

Turnow v. Hockstadter, 7 Hun. (N. Y.) 80..... 56
Tullis v. Lake Erie & W. R. Co., 105 Fed. 554..... 71

U.

Union Mining Co. v. Rocky Mountain Nat'l Bank, 96 U. S. (6 Otto) 640:24 L. 648..... 27
United Security Life Ins. & Trust Co. v. Ott, (N. J. E.) 26 Atl. 923.. 62
United States v. Macon County, 99 U. S. 282:25 L. 331..... 20
United States Mortgage Co. v. Henderson, 111 Ind. 24:12 N. E. 88.... 26
United States v. Nuestra Senora Le Regla, 108 U. S. 92:27 L. 662.... 61

V.

Van Norman v. Barbeau, 54 Minn. 388:55 N. W. 1112..... 38

W.

Ward v. Chum, 18 Gratt. (Va.) 801..... 38
Ward v. Winslow, 4 Pick. (Mass.) 518..... 38
Warring v. Williams, 8 Pick. (Mass.) 322..... 39
Washington & G. R. Co. v. Tobriner, 147 U. S. 571:37 L. 284..... 30
Wayne County v. Kennicott, 94 U. S. 498:24 L. 260..... 61
Western Union Tel. Co. v. Brown, 62 Tex. 36..... 56
Wiggins Ferry Co. v. Ohio & M. R. Co., 142 U. S. 396:35 L. 1055..... 58
Wilder v. Cowles, 100 Mass. 487..... 48
Willis v. Morrison, 44 Tex. 27..... 52
Wilson v. Wideham, 51 Me. 366..... 57
Winship v. Bank of U. S., 5 Pet. (U. S.) 529:8 L. 216..... 25
Withers v. Withers, 8 Pet. (U. S.) 355..... 34
Wood v. Connell, 2 Whartons Reports (Pa.) 542..... 24
Woolensak v. Reiher, 115 U. S. 99:29 L. 350..... 24
Wright v. Carson Water Co., 23 Nev. 49:42 Pac. 196..... 27

Y.

Yale v. Wheelock, 109 Mass. 502..... 41

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

BRIEF FOR THE PLAINTIFF-IN-ERROR.

STATEMENT OF THE CASE.

THE FACTS.

The defendants, Magoon, McStocker, Emerson, Ables, Cowart, Kirkpatrick, Powter and Moore, by an agreement dated April 10th, 1897, (Tr. p. 34 and Tr. p. 156, Ex. A) formed a partnership at Honolulu with a capital of $105,000, "in the business of administering the formulas known as the Hagey Gold Cure, and in the establishment and disposition of Institutes for the purpose of administering said formulas." The business was to be carried on in "the Islands of the Pacific and Indian Oceans, and the continent of Africa, exclusive of the Hawaiian Islands."

The partnership was for five years. The profits, expenses, and losses were to be divided between the partners in proportion to the capital stock contributed by each. "Full and correct" account books were to be kept, open to the inspection of the partners at all times and full accounts of the profits, receipts, disbursements, or *"losses by them or any of them sustained,"* were to be rendered to each of the partners once a month, or oftener. Cowart, Ables and Kirkpatrick were to have charge of the business throughout the term of the partnership, as manager, secretary-treasurer and auditor, respectively, each at a monthly salary of $200.00. None of the partners were to "give or endorse any note, or create any liability on behalf of the Company," but there was to be "a fund necessary for the establishment and maintenance of the Institutes in the Territory before referred to." It was to be placed in the hands of the three partners who were to conduct the business, and the members of the partnership were not to be "bound for any debts and obligations incurred otherwise."

At the end of the partnership accounts were to be adjusted and "every stock and stocks" and the "gains and increases," whether "in money, *goods, wares, fixtures,* debts or otherwise," were to be divided between them.

McStocker also gave Ables his power of attorney to represent him, "in all matters connected with" the partnership, "and for that purpose to establish Institutes and to sell the medicines" prepared according to the "formulas" belonging to the partnership, and "to sell and dispose of the said formulas," and "to do and perform all other acts and things that may be necessary and proper in the prosecuting of the business" of the partnership. Giving to Ables full power "to do all things in the business as he could do if personally present." (Tr. p. 158, Ex. B., Tr. p. 40.) Magoon and Emerson also gave a power of attorney to Cowart and Kirkpatrick in precisely the same language as that given by McStocker to Ables (Tr. p. 168, Ex. J, and Tr. p. 83). Ables knew of this power of attorney. (Tr. p. 45 and Tr. p. 196, Ex. E.)

The partners in charge of the business went, in pursuance of the agreement, to Auckland, New Zealand, where they met the defendant Moore, who had preceded them (Tr. p. 34), and who afterwards took part in the consultations of the partners and in the business. (Tr. p. 39.) They opened an Institute (Tr. pp. 40-1) and prior to Aug. 31st, 1897, (Tr. p. 59 and Tr. 161, Ex. D, and Tr. pp. 193-4-5, Ex. 3) made a written agreement, (Tr. pp. 59, 60, and 165, Ex. H,) by which the original partners formed a sub-partnership with J. Wolfenden to carry on the business elsewhere than in Africa. After this they formed another sub-partnership at Auckland (Tr. p. 193, Ex. 3, and Tr. p. 198, Ex. 5, Tr. p. 200, Ex. 7, and Tr. p. 170, Ex. L,) by which the new sub-partners were to be "managing directors," and "managing partners," were to furnish money "to purchase a house and lot, furniture and etc.," and were to be guaranteed 10% on their investment.

Prior to September 23rd, 1897, the partners remaining in Honolulu were aware of the latter sub-partnership made by the partners in New Zealand, as Magoon in his letter of that date (Tr. p. 200, Ex. 7,) refers to the "document" that had been sent them, and by other letters of the same date, (Tr. p. 198, Ex. 5, and Tr. p. 199, Ex. 6,) explains the purport of the document. Apparently the partners at Honolulu had acquiesced in the sub-partnership with Wolfenden; (Tr. p. 84, and Tr. pp. 198-9-200, Ex. 5, 6 and 7, and Tr. p. 161, Ex. D, Tr. p. 170, Ex. K, Tr. p. 195, Ex. 3,) but objection was made to the New Zealand agreement because of the guarantee of 10% profit. (Tr. pp. 198, Ex. 5, 199, Ex. 6, and 200, Ex. 7.)

During September and October, 1897, the partners at Auckland (Tr. p. 169, Ex. K, Tr. p. 170, Ex. L, and Tr. pp. 62, 70-1), "had a deal on foot to form a Company for Sydney," by which they sold "to a local syndicate" a half interest for £12,500, which was afterward modified by selling to "two gentlemen" a "one-half interest in the Pacific and Indian Oceans." From this last "deal" the partnership to which Wolfenden belonged received £5000 (Tr. pp. 70-71).

About September 16th, 1897, the plaintiff and the defendants made an agreement (Tr. p. 98 and Tr. 178, Ex. O,) by which a sub-partnership was formed to carry on business in Tasmania. It was made between "The African, Pacific and Indian Hagey Company" and Alfred Edward Gilmore and the plaintiff, and stated that "whereas the said parties hereto propose to enter into partnership: * * * Now these presents witnesseth," &c. It recited that the plaintiff had paid £2000 for a two-fifths interest in the "partnership business" and clause 4 provided: "That if at the expiration of a period of six months from the date of the departure of the said Gilmore and the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount of the £2250 * * * in exchange for the portion of said £2250 taken by him." It was signed in the partnership name by Wolfenden and the managing partners of the original Hagey Company then in New Zealand and by Gilmore and the plaintiff.

This agreement was afterwards slightly altered in lead pencil and then, after putting the words "taken by him" in clause 4 after the word "amount," was re-typewritten and again executed by the same parties in the same way on September 21st, 1897. (Tr. p. 180, Ex. P.)

The consideration, paid by the plaintiff and set forth in the agreement as £2000, was the conveyance to Ables (Tr. 182, Ex. Q, and Tr. pp. 98-9,) of about 6000 sheep with increase and a sheep run. Five hundred of the sheep were held by the plaintiff merely as a pledge to secure the payment of certain indebtedness (Tr. p. 144).

At the time the first agreement was signed by him, the plaintiff had neither seen (Tr. p. 98) the Articles of Association of the original Hagey Company (Tr. p. 156, Ex. A), the agreement admitting Wolfenden to a sub-partnership (Tr. p. 165, Ex. H), nor the powers-of-attorney (Tr. p. 158, Ex. B, and Tr. p. 168, Ex. J,) under which the three managing partners

of the Hagey Company in New Zealand had made the agreement with Wolfenden or the agreement with himself. After he saw the partnership articles and powers-of-attorney he "wanted some changes made" (Tr. p. 98). He arranged to have the pledged sheep conveyed to Ables and the indebtedness they secured released and in consideration thereof the agreement made by the plaintiff was again changed and finally executed on October 1st, 1897 (Tr. pp. 99-100, Tr. pp. 159, 160-1, Ex. C). Upon this last agreement the present action is brought.

The principal changes made in the agreements in consideration of the conveyance of the pledged sheep and because the plaintiff had seen the powers-of-attorney and Articles of Partnership of the Hagey Company were:

1. That the last agreement set out the partners in the original Hagey Company by name, and instead of providing merely that "the said parties hereto propose to enter into partnership," there was inserted after, "Now these presents Witnesseth," the following clause: *"For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated."*

2. The new agreement gave the right to rescind and receive the stock of the market value of £2000 "at or before the expiration of a period of six months," instead of "at the expiration of a period of six months."

3. The new agreement was executed by each of the partners—either personally or by his attorney—individually.

The partners at Auckland when making these agreements represented to the plaintiff that their original partnership agreements made it necessary for them to keep on hand a fund to meet all liabilities they incurred in the business; and consequently they would hold stock of the value of £2000 during the option given to him (Tr. pp. 121-2).

On October 1st, 1897, Cowart wrote Magoon (Tr. pp. 85-91, and Tr. p. 170, Ex. L), "We sold ½ interest in Tasmania last week for 8000 sheep and £500. The parties could not raise

£500 after agreeing to but paid £250 and took ½ less £250. The sheep and lease of the land, 24,000 acres, was valued at £2000. We hope to sell the sheep in a short time. * * * Ables and Col. Moore have not and will not sign any papers (Ables did sign the papers for Tasmania)."

Under date of October 1st, 1897, Ables wrote to McStocker enclosing a trial balance with an item for Territory of £250 (Tr. pp. 193-4-5, Ex. 3). By a memorandum dated September 30th, 1897, annexed to his letter of October 2nd, 1897, he again wrote him: "The £250 is payment received on account of sale of Tasmania. £100 of this is to be put into the funds towards defraying expenses of parties going there. The sale of Tasmania was for 9-20 of the Territory. We get this amount of money and about six thousand sheep which are about 270 miles from Auckland and of uncertain value. On October 2nd, 1897, he wrote: "At the last moment Col. Moore has decided to go to Honolulu and Texas. He will put things to you as they are." (Tr. pp. 48-77-81, and Tr. p. 161, Ex. D, and Tr. p. 194, Ex. 3.) Moore left Auckland about October 2nd, 1897, (returning before December 6, 1897,), (Tr. pp. 94-5 and Tr. p. 161, Ex. D, and Tr. p. 104, Ex. 3), and after, or at the time of, the receipt by Magoon and McStocker of the three last mentioned letters, he arrived at Honolulu and saw the partners living there (Tr. pp. 86, 93-4). From things the partners at Honolulu learned at and subsequent to Moore's visit they concluded that Cowart and Kirkpatrick were doing wrong and that Ables and Moore were in the right (Tr. p. 93). The only matters the partners at Honolulu expressed dissatisfaction with in their letters, which are in evidence, to those at Auckland, were the guarantee of 10% on their investment to their sub-partners at Auckland, (Tr. pp. 198-9, 200, Ex. 5, 6, and 7), the making of the sub-partnership with Wolfenden, and the taking "in payment of sheep or lands" for territory (Tr. p. 203, Ex. 8). They did not object to the last two arrangements until months after they knew of them. All these matters were known to them at the time of Moore's visit. The only matters that the letters in evidence informed them of after Moore's visit, that they had

not known before, were the payment to the partnership of £5000 under the "deal" to form a company for Sydney, and the payment of the 18% dividend, concerning neither of which do they make any complaint (Tr. pp. 86, 93-4, and Tr. p. 170, Ex. L, and p. 169, Ex. K).

Mrs. Emerson says (Tr. p. 92): "As soon as our suspicions were aroused, * * * we did everything in our power to stop our power-of-attorney." Magoon and Emerson first endeavored to stop their power-of-attorney and showed they had entirely lost confidence in Cowart and Kirkpatrick when they wrote to Dexter on Oct. 21st, 1897, (Tr. p. 206, Ex. 10 and 11). This was subsequent to Moore's visit as the steamer time from Auckland to Honolulu is twelve days and Mrs. Emerson says: "We didn't altogether believe what Moore stated there. It was subsequent facts that made us think that he and Mr. Ables were right and Cowart and Kirkpatrick were in the wrong." (Tr. p. 93.) What these "subsequent facts" were does not appear from the evidence, but they must have been learned from letters received at Honolulu about the time of Moore's visit.

On October 30th, 1897, a dividend of 18% on the capital stock of the partnership, to which Wolfenden belonged, was paid from the general funds, into which the money raised by the sales of the interests in Sydney and Tasmania had gone; (Tr. pp. 45-6, 70-1, 78, and Tr. pp. 193-4-5, Ex. 3; Tr. p. 161, Ex. D; Tr. p. 170, Ex. 1; Tr. p. 169, Ex. K) and the partners at Honolulu when they received the dividend knew how the fund had been made up (Tr. pp. 48-9, 50, 56, Tr. p. 162, Ex. E, and Tr. p. 169, Ex. K), and shortly afterwards received a trial balance showing its items (Tr. pp. 79, 93-4, Tr. p. 196, Ex. 4, and Tr. p. 178, Ex. N).

When the sheep and run were conveyed, it was represented to the plaintiff, that Ables took them for his interest in the original partnership (Tr. p. 99); and that he intended to keep them for his own use (Tr. pp. 120, 132). They had cost the plaintiff about £1800 within ten months prior to the conveyance (Tr. pp. 143-4-5) to Ables; they were 270 miles from Auckland; not more than four or five people competent to purchase

them had seen or knew much about them (Tr. p. 102), and at that time of year the sheep could not be rounded up to permit prospective purchasers to estimate their value, nor could they then, in plaintiff's opinion, be properly placed on sale (Tr. pp. 117-8). Yet immediately on getting them the defendants, without seeing them, sold them for £500 (Tr. pp. 66-7), "the price of the wool on their backs," as their former owner who bought them, remarked (Tr. p. 133).

On October 4th, 1897, the plaintiff started for Tasmania, but remained in Sydney, N. S. W.—about half way to Tasmania—until the medicines and instructions for carrying on the business were sent to him, they being forwarded from Auckland about October 12th, 1897 (Tr. p. 62, Tr. p. 168, Ex. I). When he received the instructions they showed the business to be so different from what it had been represented (Tr. pp. 100-1, 124-5-6-7, and Tr. p. 184, Ex. S), that he returned to Auckland and asked to be released from the contract and to have the consideration returned to him (Tr. pp. 102-3, and 130-1-2). But when he got back he learned—as he had feared—(Tr. p. 102) that the sheep and run had been sold by the defendants before they sent him either the instructions or the medicines (Tr. pp. 66-7). The defendants promised to get him back the sheep and run and release him from the contract, but failed to do so (Tr. pp. 103 and 134-5); and he again started for Tasmania on January 17th, 1898, (Tr. p. 128), "to give the business a trial."

The plaintiff opened an Institute at Hobart during February, 1898, but the business proved unsatisfactory to him (Tr. pp. 104-5-6-7 and 135-139), and he set out for Auckland. On March 10th, 1898, he met the defendants Kirkpatrick and Wolfenden at Sydney, N. S. W., notified them of his dissatisfaction and demanded stock of the market value of £2000 according to the agreement (Tr. pp. 107-8, 139 and 188, Ex. T). They gave him neither the stock nor its value, and he proceeded to Auckland. There he learned that all the defendants, except Cowart, who had personally signed the agreement with him, had left New Zealand, and he was unable to find where they

were, so he, forthwith, brought suit in the Supreme Court of New Zealand for £2000 damages for breach of contract (Tr. pp. 109-110). Cowart was served with the summons in New Zealand; and Ables—who had gone to Australia, and afterwards returned to Honolulu (Tr. p. 54, and Tr. p. 196, Ex. 4)—was served with the defendants Magoon, McStocker and Emerson at Honolulu on July 23rd, 1898, (Tr. pp. 58, 87, 147, 221 and 171, Ex. M). On the 13th of June, 1899, the plaintiff recovered judgment, against all the defendants but Wolfenden, in the Supreme Court of New Zealand (Tr. p. 110 and Tr. p. 189, Ex. U). He failed to collect anything on the judgment (Tr. p. 110) and, therefore, came to Honolulu and instituted this action in November, 1899, (Tr. p. 1). Prior to his arrival at Honolulu none of the defendants there had notified plaintiff that they repudiated the contract (Tr. p. 110), nor had the plaintiff known of the correspondence put in evidence between the defendants at Honolulu and Dexter or the defendants at Auckland (Tr. p. 111).

THE PLEADINGS.

This action was originally brought against the four defendants, Magoon, McStocker, Ables and Emerson, who were within the jurisdiction of the Hawaiian courts at that time (Tr. p. 2). The defendants demurred to the declaration on eight grounds (Tr. p. 7); and the Circuit Court sustained the demurrer (Tr. p. 8). The plaintiff took his exceptions to the Supreme Court of Hawaii (Tr. p. 10) where they were decided (13 Haw. 361 and Tr. p. 11).

Section 1222 of the Civil Laws of 1897 (Tr. p. 27) provided: "It shall be necessary to join as defendants in a civil action all joint * * * or joint and several obligors, * * * to contracts." It was argued by the plaintiff (Tr. p. 27), that this section only applied to such joint and several defendants as were within the jurisdiction of the court, and that the agreement sued upon being joint and several, it was not necessary to joint parties outside the jurisdiction as defendants. The court overruled the demurrer to the first count on

all points except the non-joinder of absent defendants; but held that the agreement was joint and several (13 Haw. 361 and Tr. p. 27) and said: "This is the construction strongly contended for by the plaintiff himself."

THE TRIALS.

The action was tried and the plaintiff obtained a verdict. This verdict was set aside upon exceptions taken to the Supreme Court of Hawaii, because the court—"Giving some definitions on the subject of 'the scope of the partnership business,' and also instructions as to the ordinary powers of partners * * * submitted to the jury the question of whether or not the execution of the contract was within such scope and, therefore, authorized" (14 Haw. 424, referred to in Tr. p. 232).

The plaintiff applied for a rehearing on the ground (14 Haw. 424 referred to in Tr. p. 232), "that the defendants, L. C. Ables, T. E. Cowart and J. H. Kirkpatrick, who personally executed the agreement upon which this action has been brought, stand in a different position from those defendants who executed said agreement through attorneys; that the reasons assigned by the court for ordering a new trial of said cause do not, and cannot, apply to the defendants above named and that as to them the verdict of the jury should not have been reversed."

The court held that the "demand relied upon was shown to have been made upon Kirkpatrick alone," that, "notice to Kirkpatrick could affect the other defendants only upon the theory of joint liability;" and that, "recovery must be either against all who are jointly liable or against each of the persons separately upon his several liability and in the latter case notice to one would not, by mere operation of law, be notice to any of the others." A judgment against Kirkpatrick or Cowart would have been a mere empty form, as they had not been served in the action and, by Section 1222 of the Civil Laws of 1897, no execution could issue against their sole property, if any were within the jurisdiction of the court.

Consequently the court denied the motion for rehearing, overlooking the fact that the summons in the action brought in New

Zealand had been served on the defendant Ables, as soon as he could be found.

The action was again tried in October, 1903, and, when the plaintiff rested, the court, on November 9th, 1903, (Tr. pp. 148, 207), granted the motion for non-suit made on behalf of each of four defendants; as the court said it had, "determined that the plaintiff cannot maintain this action as against the defendants, who have been served or who have appeared in this action." (Tr. p. 148.)

As the other defendants had neither been served nor appeared, and, consequently, by Civil Laws 1897, Sec. 1222, (Rev. Laws 1741,) no execution could issue against the sole property of any of them, the action was dismissed as to them and the jury discharged. (Tr. pp. 148, 220.)

On November 14, 1903, the plaintiff filed a motion for a new trial (Tr. p. 207) on four grounds: (1) The improper exclusion, (2) and admission of evidence; (3) the granting of the non-suit and (4) the discharge of the jury; all of which proceedings had been objected and excepted to. The motion came on for hearing on December 31st, 1903; and was continued from time to time until January 16th, 1904, (Tr. p. 220); when the court dismissed the motion, without considering its merits on the grounds: (1) That a motion for a new trial was improper in the case of a decision and judgment of non-suit and (2) that no notice of a motion for a new trial was given by plaintiff at the time of the decision and judgment of non-suit." (Tr. pp. 208, 221.) On November 12th, 1903, judgment had been signed and on December 31st, 1903, the court had given the plaintiff until twenty days after the disposition of the motion for new trial in which to present his Bill of Exceptions (Tr. p. 208). On January 20th, 1904, a stipulation was filed giving the plaintiff until twenty days after the transcript was completed to present his Bill of Exceptions, (Tr. p. 209,) if the defendants had not then the right to insist that the time for filing the bill had already expired (Tr. p. 209). The transcript was completed July 25th, 1904, (Tr. pj. 149);

and the Bill of Exceptions presented for allowance August 6th, 1904, (Tr. p. 222).

On September 2nd, 1904, (Tr. p. 222,) the defendants moved to strike the cause from the Calendar of the Supreme Court of Hawaii on the grounds that: (1) the Bill of Exceptions was filed too late, (2) that no exception lay to an order dismissing the motion for new trial, (3) that no motion for new trial lies after non-suit, and (4) that no notice of motion for new trial was given when the non-suit was granted.

The matter was argued October 3rd, 1904, and on October 31st, 1904, the court decided (16 Haw. 170: Tr. pp. 223-230): that the Hawaiian Statute (Laws of 1903, Art. 32, Sec. 18), which required the Bill of Exceptions to be presented "within twenty days after final judgment, or such further time as may be allowed by the judge," made it necessary to have an extension of time "allowed before the expiration of the twenty days allowed by statute or the extended time previously allowed by the judge under the statute." But the court held it unnecessary to decide whether the date of final judgment was November 12th, 1903, when judgment was signed, or the time when the motion for new trial was dismissed, as the statute allowed exceptions to be taken in any "proceeding," and consequently, the exception to the dismissal of the motion for a new trial might be heard. It held that under the statute an exception did lie to the dismissal of a motion for new trial as distinguished from an order overruling it, and that such a motion might properly be made after judgment of non-suit, although no notice of it had been given when the non-suit was ordered.

The exceptions were argued and the court, on December 19th, 1904, decided (Tr. pp. 231-236, 16 Haw. 332), that the filing of the motion for new trial did not keep the judgment from becoming final, for purposes of appeal, until it was disposed of, and that, consequently, the exceptions taken during the trial were not presented within the time required by statute: that the only exception the court would consider was that, "taken

to the dismissal of the motion for a new trial." That although a motion for new trial might be based generally on errors of law occurring at the trial, provided a specification of errors is not required by the trial judge, as the rulings are generally fresh in his mind; yet the appellate court could not consider the exceptions to the denial of such a motion, unless the motion showed what errors had been specifically passed upon when it was heard. Consequently, as the only ground of error specifically alleged in the motion was, that the non-suit should not have been granted on the evidence, that was the only ground the court would consider. (This decision was made although the trial judge had refused to pass upon any errors committed at the trial, whether specifically alleged or not.) The court reaffirmed its ruling, that the agreement sued on was not within the scope of the business of the partnership formed at Honolulu, and held there was no evidence to show, that Magoon, McStocker or Emerson had afterwards ratified that agreement. It reconsidered its former ruling, that the agreement was joint and several, and held, that in declaring against all the defendants the plaintiff, "took the chances of being able to show that they had all executed the agreement, and was liable to 'be non-suited at the trial if he fail in proving a joint contract' (1 Ch. on Pl. 51), unless this was an agreement binding upon the defendants severally as well as jointly;" and that, "in order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words." The court, therefore, held that the agreement was incomplete unless all the parties to it signed—"on the theory of an implied term that all are severally bound in case only of all signing"—and that as Magoon, McStocker and Emerson had not signed there was no agreement; and the exceptions were overruled.

On January 24th, 1905, the plaintiff filed a petition for rehearing (Tr. pp. 237-261); because Section 1222 of the Civil Laws of 1897 made it necessary to join all joint, or joint and

several defendants, and consequently, it must have been the intention of the legislature in such cases, either to permit judgments to be recovered against any or all of the defendants, as justice might require, or to oblige the plaintiff to recover against all the defendants or be non-suited. As the necessity of a plaintiff recovering against all the defendants—even though they were alleged to be merely joint—had been obviated by statute nearly everywhere, and as it would be plainly unjust to oblige him to recover against all joint and several defendants, thus practically making all joint and several contracts joint only, the plaintiff contended he should be allowed to recover against such of the defendants as were liable, and that it was unquestionably the law where one or more partners made an agreement, in excess of their authority, and failed to bind the firm, that such partners should alone remain liable on the contract for damages for breach thereof. He also asked a rehearing on the further ground, that as the Hawaiian statute allowing amendments (Tr. p. 245, Session Laws 1903 p. 366) was extremely liberal and permitted them to be made after judgment, he should be allowed to amend his declaration by adding a count for a quantum valebant, as he had been taken by surprise, in that he could not have anticipated that the court would reconsider its former ruling that the contract was joint and several, and not permit him to recover against any of the defendants if he could not recover against all.

On March 6th, 1905, the court denied the petition for rehearing (16 Haw. 485, Tr. pp. 262-264), because it had based its former decision on the ground that the contract sued on was incomplete, and not because it was joint and not several. The court also held, that it could not allow the proposed amendment as no error was found in the judgment below.

THE ERRORS.

The errors relied on by the plaintiff-in-error are (Tr. pp. 265-6-7):

1. It was erroneous to sustain the granting of the non-suit

as to the four defendants, Magoon, McStocker, Emerson and Ables, (Assignment of Errors, 2, 4, 5, Tr. p. 266).

2. It was erroneous to sustain the granting of the non-suit as to Ables because it was granted as to Magoon, McStocker and Emerson, (Assignment of Errors, 3, 6, Tr. p. 266).

3. It was erroneous to sustain the dismissal of the action as to the defendants not non-suited, (Assignment of Errors, 2, 6, Tr. p. 266).

4. It was erroneous to sustain the dismissal of the motion for new trial without considering its merits, (Assignment of Errors, 1, Tr. p. 266).

5. It was erroneous to refuse to consider the exceptions taken at the trial or any of the exceptions but that taken to the dismissal of the motion for new trial, (Assignment of Errors, 7, Tr. p. 266).

6. As the facts alleged and proved constituted a cause of action against the defendants, or some of them, if the pleadings as they now stand would not sustain a judgment, it was erroneous not to grant a new trial with leave to the plaintiff to amend, as he was subject to surprise, since he could not anticipate that the law of the case would be changed and the agreement held not joint and several and, therefore, incomplete and ineffective, (Assignment of Errors, 9, Tr. p. 267).

ARGUMENT.

I.

IT IS A QUESTION FOR THE JURY UNDER PROPER INSTRUCTION TO DETERMINE WHETHER THE AGREEMENT SUED ON IS WITHIN THE SCOPE OF THE PARTNERSHIP AS CONSTRUED AND ACTED UPON BY THE PARTIES.

The argument under this head is presented without sub-divisions, but the grounds may well be assigned under four heads:

(a) The agreement made at Honolulu contemplated a business of an unusual character, therefore, the managing partners required unusual powers.

(b) For the purpose of executing unusual powers, a fund was provided and put in the hands of the managing partners thousands of miles away from the other partners, which fund was exempt from the other limitations contained in the agreement. Therefore, under the peculiar language of the instrument and the powers-of-attorney given to still further effectuate it, unusual powers were apparently intended to be given.

(c) The agreement being silent as to the means to be adopted to carry out these unusual purposes and no limitations being put upon these means it is a question of fact what means were to be adopted, and this is to be found by the jury under proper instructions on all the evidence in the case.

(d) The construction put upon the instrument by the parties, the giving of the powers-of-attorney, the establishment of other institutes through the medium of copartnership are all evidence tending to show that the contract sued on is within the unusual powers contemplated by the parties, and therefore the question should have been submitted to the jury, whether in consideration of all these circumstances, giving each its due weight, the agreement is one which the plaintiff had reason to

believe was authorized by all the members of the partnership.

The law is well set forth in a case in this court which in principle covers all these grounds.

"In *Irwin v. Willer*, 110 U. S. 499, 505: 28 L. 225, Mr. Justice Matthews, speaking for the Court, said: 'The liability of one partner, for acts and contracts done and made by his copartners, without his actual knowledge or assent, is a question of agency. If the authority is denied by the actual agreement between the partners, with notice to the party who claims under it, there is no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, *the authority for each transaction may be implied from the nature of the business according to the ordinary and usual course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partners sought to be charged.' Again: 'What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time it is carried on are all questions of fact to be decided by the jury, from a consideration of all the circumstances which, singly and in combination, affect its character or determine its peculiarities, and from them all, giving to each its due weight, it is its province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all its members.* The difficulty and duty of drawing the inference suitable to each case from all its circumstances cannot be avoided or supplied by affixing or ascribing to the business some general name, and deducing from that, as a matter of law, the right of the public and the duties of the partners.'

"It is very clear that the articles of agreement between Ferry, White and Dowling did not create a partnership, each member of which had, under the settled rules of commercial law, and as between the firm and those dealing with it, authority to give negotiable paper in its name. * * *

"The difficulty in this case is that the jury were not permitted to determine, from a consideration of all the circumstances of the case, what, in view of the admitted nature of the business of F. H. White & Co., was necessary and proper to its successful operation, what was involved in the usual and ordinary course of its management by those engaged in it, or what should be inferred from the actual course and conduct of the partnership, so far as it was known, *or ought reasonably to have been known,* to the parties sought to be charged with liability. * * * It is sufficient to say that the issue as to whether the defendants were estopped to dispute the authority of Edward P. Ferry to make the notes in suit, in the name of F. H. White & Co., was one peculiar for the jury, under all the facts indicating the nature, necessities and course of the business of the firm, and under proper instructions from the court as to the legal principles by which they should be guided in determining the case."

Dowling v. National Exchange Bank of Boston, 145 U. S. 512: 36 L. 795, 797.

"Evidence of such apparent authority is not restricted to proof of general custom, to proof that the agent had previously performed similar acts to the knowledge of the principal. The nature of the business usage, not amounting to a general custom, and the fact, if it exists, that the principal is at a great distance, and the agent apparently entirely in charge of the business, may, in proper cases, be, among other things, elements for consideration."

Johnston v. Milwaukee & W. Inv. Co., 49 Neb. 68: 68 N. W. 383.

The partners sent to New Zealand were going to a country, many thousands of miles from those at Honolulu, without tele-

graphic or other means of rapid communication. They were to establish and sell a business, uncommon and almost without precedent, among a foreign people, and to contend with customs or prejudices of which those at Honolulu knew nothing. Naturally they were given the broadest discretion in establishing and disposing of such a business, especially with regard to getting people of local influence to join in its development, or to purchase from them. The partners at Honolulu fearing that the ordinary authority under the articles of partnership was insufficient, gave the managing partners in New Zealand powers-of-attorney to supplement their authority.

The partnership articles (Tr. p. 156, Ex. A) do not prescribe the methods to be followed by Cowart, Kirkpatrick and Ables in "the establishment and disposition of Institutes for the purpose of administering" the formulas known as the "Hagey Gold Cure." The powers-of-attorney state that they have authority, "to sell and dispose of the said formulas in the districts where they may be operating," and "to sell the medicines compounded under the formulas." The general authority given in the Articles was therefore wide enough to include the specific authority stated in the powers.

The authority to make sub-partnerships *is not denied* by "the agreement between the partners" and the "contract of partnership is silent," in that respect. A fund was provided for the "establishment and maintenance of the Institutes" and placed under the control of the partners making the contract. The capital of the concern was $105,000, which is undisposed of except for the purposes of this fund. The right of the partners to incur liability in connection with the fund is not only apparent on the principle, *"expressio unius est exclusio alterius;* but is especially excepted from the clause that forbids the creation of liability, while the losses were to be borne "in accordance with the proportional share, that each may hold;" and the managing partners were to render accounts once a month or oftener if necessary, "of all * * * the losses by them or any of them sustained."

The following cases are cited in support of the principles of construction just applied:

Haldane v. United States, 69 Fed. 819; *Evanston v. Gunn*, 99 U. S. 665: 25 L. 306; *United States v. Macon County*, 99 U. S. 582: 25 L. 331; *Thomas v. West Jersey R. R. Co.*, 101 U. S. 71: 25 L. 950.

The prohibition that "none of them will give or endorse any note, or create any liability on behalf of the company," referred to the creating of liabilities in the nature of promissory notes and was limited by the following provisions concerning the fund.

The principle ejusdem generis is supported by the following cases:

Given v. Hilton, 95 U. S. 591: 24 L. 458; *Andrews v. Schoppe*, 84 Me. 170: 24 Atl. 805; *Benton v. Benton*, 63 N. H. 289; 56 Am. Rep. 512; *Boon v. Aetna Ins. Co.*, 12 Blatchf. (U. S.) 24: 3 Fed. Cas. Case 1639; *Kendall v. Almy*, 2 Sumn. (U. S.) 278: 14 Fed. Case 7690; *South v. Maryland*, 18 How. (U. S.) 396: 15 L. 433.

Even if the agreement "did not create a partnership the managing members of which, under the settled rules of a commercial law" had authority to make sub-partnerships, the authority for such transactions may, "be inferred from the actual though exceptional course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partners sought to be charged." The business was so unusual that there appears no evidence as to the "ordinary course in which it is carried on by those engaged in it in the locality which is its seat."

The partners in New Zealand—before making the agreement sued on—attempted "the establishment and disposition of Institutes," and "to sell the medicines" or formulas only by forming sub-partnerships. They formed the first of these prior to September, 1897, and the partners at Honolulu knew of the second sub-partnership—which involved the partners at Honolulu in a guarantee of 10% on the investment of their sub-partners—before the agreement sued on was executed (Tr.

p. 200, Ex. 7). The articles of partnership of the original Hagey Co. provided that full accounts of the business should be rendered once a month, or oftener, and the plaintiff on seeing them had every reason to "presume" that the partners at Honolulu, now sought to be charged, knew of this method of conducting the business, and had acquiesced therein; since, at that time, they had taken no steps to warn people, where the business was being conducted, that the partners there had made contracts in excess of their authority.

"One member of a partnership can not make such a contract as will involve the creation of another partnership between his own firm and other parties, so as to bind thereby his copartners, unless he has other authority than that which is incident to the mere relation of partners.

"But, in such case, for the purpose of showing authority to make such a contract, and the acquiescence of his partners therein, it is competent to prove that similar contracts had been repeatedly made by him before, which were ratified and executed by his copartners without objection; and letters written by the objecting parties, tending to show their acquiescence in such contracts, are also competent evidence for the same purpose."

Buckingham v. Hanna, 20 Ind. 110, citing *Jewett v. R. R.,* 10 Ind. 539.

When the partners at Honolulu had acquiesced in those at Auckland making an agreement of sub-partnership to pay 10% on the investment of their sub-partners, the plaintiff had reason to believe the partners at Auckland had authority to agree to return to him the value of what he paid them, if he were dissatisfied.

The Court should have ruled that the agreement was within the scope of the business, or that there was evidence to go to the jury on the question.

II.

IF THE AGREEMENT SUED ON WAS NOT WITHIN THE SCOPE OF THE BUSINESS OF THE PARTNERSHIP SUED, YET THERE WAS EVIDENCE THAT THE PARTNERS WHO EXECUTED IT BY ATTORNEY, AFTERWARDS RATIFIED IT.

(a) They ratified it when they received the 18% dividend.

As Magoon, McStocker and Mrs. Emerson "were all living" at Honolulu and "closely related," Magoon and McStocker "being in the same business," and Mrs. Emerson in Magoon's employ, Ables considered communication to one was the same as communication with all (Tr. p. 51, and Tr. p. 196, Ex. 4).

On October 1st and 2nd, 1897, the time the agreement was signed, Ables wrote McStocker, and Cowart wrote Magoon, that they had sold a fractional interest in Tasmania for cash, sheep and lands (Tr. p. 161, Ex. D, and Tr. p. 170, Ex. L); and Ables told McStocker that Moore was "going to Honolulu and Texas by *this* mail * * * to put ourselves right in the eyes of you" (Tr. p. 194, Ex. 3), and that: "He will put things to you as they are." The partners at Honolulu knew, when they received these letters, several sub-partnerships had been formed in New Zealand, and could not well expect the fractional interest would be sold without forming another. They knew they were parties to a guarantee of 10% profit to certain of their sub-partners in New Zealand (Tr. p. 200, Ex. 7, and Tr. p. 193, Ex. 3); and they, therefore, had reason to expect the agreement with the plaintiff might secure him. They knew Ables had signed the agreement concerning Tasmania, but that Moore had refused to sign it and probably had strong objections to it (Tr. p. 170, Ex. L); and they saw Moore and talked with him about the partnership when he arrived in Honolulu along with the letters telling them of the agreement. They knew that money received from the sale of the fractional interest had gone into the funds of the original company, and that more money would be realized when the sheep were sold (Tr. p. 161, Ex. D; Tr.

p. 170, Ex. L, and Tr. pp. 193-5, Ex. 3). When Moore arrived, or immediately thereafter, Magoon and Emerson wrote Dexter asking him to take steps to limit the authority of Cowart and Kirkpatrick (Tr. pp. 206-7, Ex. 10 and 11); but they made no effort to in any way repudiate what Cowart or Kirkpatrick had done; and when the 18% dividend arrived in the first part of November, 1897, the partners at Honolulu seem to have acquiesced in the situation, as they do not appear to have written to Auckland by return mail, since the steamers carrying the mails between Honolulu and Auckland sailed each way every four weeks, one leaving Honolulu a few days after the arrival of the Auckland mail. By the mail leaving Auckland four weeks after the dividend was sent (Tr. p. 196, Ex. 4), Ables wrote he was about to abandon the business, for McStocker and Magoon not to "hesitate to cancel" his power-of-attorney, that he would wait until they sued him or they heard from him again; and that they were to send letters "care of Steward of steamer," as they might not reach him. Magoon and Emerson then wrote to Dexter (Tr. p. 201, Ex. 8), although they knew "full well" he had refused to represent them—*in case Cowart and Kirkpatrick refused to buy out the partners at Honolulu*—to publish a notice that they were not authorized "in any capacity whatever" to represent them (Tr. p. 204, Ex. 9). They did not, however, attempt to repudiate what had been done, or to return the money they had received by reason of the transactions they objected to, while Dexter did nothing in the matter (Tr. pp. 110, 111), nor did they take any action.

The partners at Honolulu, therefore, ratified the agreement sued on when they received the 18% dividend out of the funds into which the proceeds of the sale had gone, without offering to return the consideration they received under that agreement, as they either then knew the material features of the agreement, or, well knowing the partners at Auckland had exceeded their authority, and having knowledge of the chief features of what had been done, they failed to inform themselves about it when given full opportunity to do so, since they were aware they could not keep the consideration, if they knew the exact terms

of the agreement, and not be bound by those terms. Magoon and Emerson say (Tr. p. 202, Ex. 8): "I do not know whether they have violated the agreement or not, or whether they have attempted to make me liable in any way; but I have an indefinite dread that they may do something in this connection prejudicial to my interest." Yet, although they knew of everything that caused this dread when Moore was at Honolulu in October, 1897, they cannot remember, either that he referred to the "Tasmania agreement or the sheep," or that they spoke to him about the matter. (Tr. pp. 86-93-4.)

"The rule is well settled that where a principal accepts the benefits of an unauthorized act of an agent with knowledge, actual or constructive, of all the material facts, he is deemed to have ratified the act and is bound thereby.

Harrison v. Magoon, 14 Haw. 424.

McGahan v. National Bank of Rondout, 156 U. S. 218: 39 L. 403.

"Where upon the face of the title papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof."

Oliver et al v. Piatt, 3 How. (U. S.) 333: 11 L. 622.

"The law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it."

Woolensak v. Reiher, 115 U. S. 99: 29 L. 350.

"The assent of one of two partners to a contract made by the other partner for the junction of the firm with a third person in another partnership, may be inferred from circumstances: and such assent may be implied from the acts of one of the parties, the declarations of another, and the conduct of a third, taken together."

Wood v. Connell et als., 2 Wharton's Reports (Pa.) 542.

"Where a member of a firm engages the firm in another partnership, a ratification by the other partner may be presumed by his silence after he has knowledge of the fact."

Tabb v. Gist, 23 Fed. Case No. 13, 719: 6 Call. 279: 1 Brock 33: 38.

"Where a partner entered into an agreement for the firm outside of the scope of its business, it is not necessary in an action thereon, that a ratification be established by direct proof, but it may be inferred from the general course of dealing between the members of the firm."

Guthiel v. Gilmer, 27 Utah 496: 76 Pac. 628.

In *Winship v. Bank of United States,* 5 Pet. (U. S.) 529: 8 L. 216, it was left to the jury whether the fact that certain transactions were entered on the partnership books conclusively showed knowledge of the other partners, and therefore, ratification. The judges, "left the jury to draw their own conclusion as to the knowledge of the Binneys, of the entries in the partnership books, from the whole transaction."

"If a principal, after knowledge that his orders have been violated by his agent, receives merchandise purchased for him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, a ratification of the agent's acts may be inferred."

Bell v. Cunningham, 3 Pet. (U. S.) 69.

"Where bailiffs sent by the landlord to distrain for rent upon a certain farm exceeded their authority in taking beyond the limits of the farm cattle belonging to another person than the tenant, and the cattle were sold and the landlord received the proceeds, the landlord was held not liable in trover unless the jury should find that he ratified the acts of the bailiff with knowledge of the facts, or that he chose without enquiry to take the risk upon himself and adopt the whole of their acts."

Lewis v. Read, 13 M. & W. 834.

Other cases of ratification from implied notice are:

Bank of Monongahela Valley v. Weston, 159 N. Y. 201: 54 N. E. 41.

Nichols Shephard & Co. v. Shaffer, 63 Mich. 599: 30 N. W. 383.

Neimeyer Lumber Co. v. Moore, 55 Ark. 240: 17 S. W. 1028.

Stokes v. Mackay, 140 N. Y. 640.
Roger v. Kneeland, 10 Wend. (N. Y.) 218.
Garrett v. Carter, 42 Pa. St. 143.
Elkenberry v. Edwards, 67 Iowa 14: 24 N. W. 570.
United States Mortgage Co. v. Henderson, 111 Ind. 24: 12 N. E. 88.
Garden v. Warren, 52 Mich. 309: 17 N. W. 853.

(b) They Ratified it When They Received the Summons from New Zealand, and Failed to Repudiate the Contract and Return the Benefits Received Under it.

If the partners at Honolulu had not knowledge, actual or implied, of all the material facts concerning the agreement sued on, when they received the 18% dividend, they certainly acquired such knowledge when they were served, on July 23rd, 1898, with the summons in the action brought in New Zealand (Tr. pp. 58, 87, 147, 221 and 171, Ex. M); and when they then failed to notify the plaintiff that they repudiated the agreement and to offer him back the consideration and benefits they received thereunder, they ratified the contract (Tr. pp. 110 and 111). It was then their duty to, at least, tender back to him the portion of the £500 cash, realized from the sale of the sheep, that they each had received; as that £500, together with the £250 received under the agreement sued on, either went into the fund from which the dividend was paid or went towards paying the expenses of the business of the defendants, as partners. If £450, out of the £750 realized by them in pursuance of the agreement, had not been received by them when the dividend was paid, yet it was an asset of the partnership known both to the partners at Honolulu and those at Auckland at that time, and must have been considered in determining the amount of the dividend, and it was afterwards used, with the knowledge of all the partners for the benefit of the partnership business; and thus they all knowingly received the full benefit of it (Tr. pp. 44-5-6-7-8, 78-9 and 161, Ex. D; p. 162, Ex. E; p. 169, Ex. K; p. 170, Ex. L; p. 178, Ex. N; pp. 193-4-5, Ex. 3; p. 196, Ex. 4),

as all the partners would otherwise have been liable for the expenses defrayed by this £450.

"It is a general rule applicable to all persons and corporations, and is a dictate of plain honesty, that whoever, knowing the facts of the case, retains and uses money received by an agent for his account, cannot repudiate the contract on which it is received."

Mayor of Nashville v. Ray, 19 Wall. (U. S.) 468, 484: 22 L. 164, 171.

"If defendant meant to repudiate W's order made in his name, he should have distinctly notified the C's of such repudiation as soon as he could conveniently do so (or within a reasonable time) and should have promptly returned the bills of lading, which gave him the legal title to and control of the goods.

"The question whether defendant ratified and adopted the contract made by W., is for the jury, upon all the facts."

Cooper v. Schwartz, 40 Wis. 54.

Other cases on this point are:

Union Mining Co. v. Rocky Mountain National Bank, 96 U. S. (6 Otto) 640: 24 L. 648.

Rolling Mill v. St. Louis, &c., R. R. Co., 120 U. S. 260: 30 L. 641.

Pittsburg, &c., R. Co. v. Keokuk Bridge Co., 131 U. S. 381: 33 L. 160.

Wright v. Carson Water Co., 23 Nev. 49: 42 Pac. 196.

Perkins v. Booth, 71 Me. 94.

Even where the principals do not learn all the details of the unauthorized contract, made by their agent, until after action is brought, if they then fail to return money which has been received under the contract, by the agent who made it without authority, and expended by him on their behalf before they learned all the details, they are held to ratify the contract.

This principle is fully recognized in *Russ v. Hansen,* 119 Iowa 375: 93 N. W. 502.

"Plaintiff commenced an action of replevin to recover of the defendants certain cattle, the possession of which had been

acquired by defendants through an alleged unauthorized sale of the cattle to them by an agent of plaintiff. The defendants' answer was a general denial. After commencement of the action, but before trial, the plaintiff gained knowledge that it had received the benefit of a portion of the proceeds of the unauthorized sale, (the money having been paid out by the agent "in connection with the running of" plaintiff's ranch.) Held, that it should then have returned to the defendants so much of the proceeds of the sale as had been applied to its benefit, or tendered such return, and its failing so to do would be a ratification of the sale, which related back to its inception."

Johnston v. Milwaukee & Wyoming Inv. Co., 49 Neb. 68: 68 N. W. 383.

"Where an indebtedness was settled and receipted for in full by plaintiff's agent on acceptance of notes for a lesser amount and a mortgage securing the same, which notes and mortgage were turned over to plaintiff, who kept the same, and never tendered their return, though advised by defendant's answer, filed within three months thereafter, of the cancellation of the indebtedness, and their procurement by means thereof, no recovery could be had for the balance of such indebtedness nine months thereafter, though such cancellation was without authority, since the principal's act constituted ratification."

Fleishman v. Ver Does, 111 Iowa 322: 82 N. W. 757.

The same principle applies where the parties so ratifying are defendants, as well as where they are plaintiffs.

"A principal must disaffirm the unauthorized act of its agent within a reasonable time after such act comes to its knowledge, or it will be bound thereby.

"A principal sued upon an unauthorized contract made by its agent may, on the trial of the case, disaffirm the agent's act, if at that time such act is first brought to its knowledge. * * * And if it then desired to disaffirm that act of its cashier (the agent) it should on the trial amend its answer, * * * and return, or offer to return," the consideration, or its proceeds.

Farmers' & Merchants' Bank of Elk Creek v. Farmers' & Merchants' National Bank of Auburn, 49 Neb. 379: 68 N. W. 488.

And where one partner undertakes to introduce a stranger into the firm, without authority, if the other members of the firm acquiesce after knowing all the facts they will be bound.

"One partner cannot, without the consent of the others, introduce a stranger into the firm nor can he, without such consent, make the other partner a member of another firm, but such consent may be implied from the acquiescence and acts of the parties; and if such other partner is made acquainted with the facts, he ought to dissent from the arrangement, otherwise he will be bound by it."

Mason v. Connell, 1 Wharton's Reports (Pa.) 381.

In such a case notice, to one of the parties to the unauthorized agreement before that agreement was ratified, would be notice to firm if the agreement were afterwards ratified.

It has been repeatedly decided in the case at bar that: "Notice to and demand upon Kirkpatrick was sufficient notice to and demand upon all of the other members of the A. P. & I. H. Co., provided they all executed or subsequently ratified the Tasmania agreement."

Harrison v. Magoon, 14 Haw. 425: Idem 531-2.

This statement of the law is sustained by the decisions of this Court.

"A ratification by one, of the unauthorized act of another, respecting the property of the former, operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened."

Cook v. Tullis, 18 Wall. (U. S.) 332: 21 L. 933.
Pickering v. Lomax, 145 U. S. 310: 36 L. 716.

III.

THE PLAINTIFF IS ENTITLED TO HAVE ALL THE QUESTIONS AS TO WHETHER THE AGREEMENT WAS WITHIN THE SCOPE OF THE PARTNERSHIP BUSINESS AS CONDUCTED BY THE DEFENDANTS, OR WAS RATIFIED BY THE PARTNERS WHO EXECUTED BY ATTORNEY, LEFT TO THE JURY.

"Where evidence is 'capable of more than one construction' or of 'more than one inference, the jury alone is to determine the meaning to be conveyed, and the inference to be drawn from facts proved where more than one inference may be drawn reasonably.'—Perry, J., in *Smith v. Hamakua Mill Co.*, 15 Haw. 655."

Peabody v. Damon, 16 Haw. 451.
Washington & G. R. Co. v. Tobriner, 147 U. S. 571: 37 L. 284.

"Where the evidence is conflicting on the question as to whether a certain act of a partner was within the scope of his authority or was ratified by the other partner, this is also a question of fact for the determination of the court or jury, as the case may be."

Cassidy v. Saline County Bank, 14 Okl. 532: 78 Pac. 324.

IV.

THE AGREEMENT IS JOINT AND SEVERAL.

(a) It is the law of the case.

The Supreme Court of Hawaii (13 Haw. 360: Tr. p. 26) held:

"The agreement sued on (quoting from it) 'witnesseth: for and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said company collectively do hereby con-

stitute and accept the said parties of the second part as partners as hereinafter stated;' and then goes on to specify the details of the contract. As we construe this clause, it is in effect as though the language used had been, that for the consideration stated 'the parties of the first part do hereby, jointly and severally, make, with the parties of the second part, the following agreement of partnership.' The contract made in the opening clause by the parties of the first part is joint and several, and the contract there made is that the details of which are specified in the succeeding clauses. If paragraph 4 stood entirely by itself, it would probably be construed to mean that the members of 'the company' jointly were liable for the promise there set forth to give Harrison certain stock upon the happening of a certain contingency. The paragraph, however, cannot, we think, be read by itself; it must be read in connection with the opening sentence above quoted, and if so understood the result is the finding that the promise in question was a joint and several obligation on the part of the members of the company. This is the construction strongly contended for by the plaintiff himself."

When the case was next before the Supreme Court, after the verdict, it again held: "The promise contained in paragraph 4 sued on, was that 'the company' would deliver the stock. The parties jointly and severally undertook that they as partners of the company would do this."

Harrison v. Magoon et al., 14 Haw. 425-6, referred to Tr. p. 232.

And in the decision on the petition for rehearing it was held: "With possible exceptions not material in this case, the recovery must either be against all who are jointly liable or against each of the persons separately upon his several liability."

Harrison v. Magoon et al., 14 Haw. 532, referred to in Tr. p. 235.

(b) Such was the clear understanding of the parties.

The evidence, as to the relations of the parties when the agreement was made, shows that two agreements were first made

which bound the partnership jointly (Tr. p. 178, Ex. O, and Tr. p. 180, Ex. P); but when the plaintiff saw the powers-of-attorney and partnership articles (Tr. p. 98) he gave a further consideration (Tr. p. 99 and Tr. p. 183, Ex. R) to have the agreement changed, so that the partners of the original concern were each named and contracted, "for themselves individually and the said company collectively." He wished, after seeing the articles and powers, to have the partners in New Zealand bound to perform the contract individually should it afterwards develop, that the authority they represented themselves to have to bind the 'company collectively' should be successfully repudiated by some of their other partners; and as Cowart and Kirkpatrick were both lawyers (Tr. p. 113) the partners in New Zealand must have thoroughly understood the plaintiff's object in having such a change made, and their representations, that they individually owned stock if made liable therefor under the contract, shows it (Tr. pp. 121-2). It was the evident intent of all parties, that the obligation of the members of the original Hagey Company should be joint and several, and the language used can bear only one construction.

"It is true that in case of ambiguity in contracts, as well as statutes, courts will lean towards the presumed intention of the parties or the legislature, and will so construe such contracts or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction and this principle does not apply."

Caldron v. Atlas Steamship Co., 170 U. S. 280: 42 L. 1033, 1036.

(c) Such is the uniform construction put upon the word "individually" by the Courts.

"JOINT AND SEVERAL: Said of obligations in which all the obligees are to be held either collectively or as individuals."

Anderson's Dictionary of Law, 573.

"In some of the cases referred to the word 'each' is used, and in some the word 'severally;' and it is argued that the word in-

dividually, as used here, is in no sense equivalent to either of those words, and that there is no several liability. The word individually means separately, and this again means singly. Again, the word 'severally' means separately. To separate is to disunite, to divide, to disconnect, to sever. Things which are equal to the same thing are equal to each other."

Meisser v. Thompson, 9 Ill. App. 370.

"An individual is one entity, one distinct being, a single one, and when spoken of the human kind means one man or one woman. To individualize is to single out from the species."

People v. Doty, 80 N. Y. 225, 228.

"Where a husband and wife jointly undertake an employment each contributing labor and skill, it will be considered as the husband's business; and the profits therein are not the individual earnings of the wife, within the meaning of Rev. St. Sec. 2343, which provides that such earnings, except those accruing from labor performed for her husband, or in his employ, shall be her separate property."

Emerson Talcott Co. v. Knapp, 90 Wis. 34: 62 N. W. 945.

"It is said in some of the cases upon this subject that chancery can not interfere to compel the trustee to make a distribution of the fund in his hands, contrary to the express terms of the deed, but that when there is a fair opportunity to introduce construction, that the court will compel a distribution to all the residue of creditors not expressly provided for, if by the terms of the deed they are not expressly excluded. * * *

"Assignment which does not provide for payment of all debts of the assignor before the residuum is to be paid back to him is void. And the term 'individual debts' used by him in making the assignment can not be held to mean all his debts where the evidence shows that he had other than individual debts."

Goddard v. Hapgood and Trustees, 25 Vt. 351: 60 Am. Dec. 272.

"The bill alleges that each party was to pay his own individual expenses. * * * It was manifestly intended to

apply to private or family expenses, not connected with the business of the partnership."

Withers v. Withers, 8 Pet. (U. S.) 355.

"By the 7th section of the general Act relative to manufacturing incorporations (3 Rev. Stat. 222, 2nd Ed.), the stockholders are made individually liable for the debts of the corporations, to the extent of their respective shares of stock.

"Under that section it has been held by the Supreme Court that the liability is several and not joint."

Bank of Poughkeepsie v. Ibbotson, 24 Wend (N. Y.) 473, and 5 Hill 461.

Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 255, 270.

"The word 'individually' in the 6th section of the Act relates to the personal liability of the members of the corporation as contradistinguished from their liability in their corporate capacity."

Sewall v. Allen, 6 Wend. (N. Y.) 335, 347.

"In an Indian treaty providing for the assignment of lands to families and individuals it was held that the word individual meant a person not a member of the family."

Summers v. Spybuck, 1 Kan. 294.

"V. S. Sec. 582-584 requiring every savings bank and trust company to pay a state tax upon the average amount of its deposits after deducting therefrom individual deposits in excess of $1500 each, and providing that no other tax shall be assessed on such deposits, except on individual deposits exceeding $1500, do not prevent the assessment of municipal taxes on the excess over $1500 of an trust fund held by a bank or trust company as trustee. * * *

"We think the word 'individual' was not used to distinguish between ordinary bank deposits and funds held upon special trust, but to resolve the aggregate as previously made up into its several holdings, as a basis for exempting $1500 each."

Montpelier Sav. Bank & Trust Co. et al. v. City of Montpelier, 73 Vt. 364: 50 Atl. 1117, 1118.

See also on this point:

Buckmaster v. McElroy, 20 Neb. 557: 57 Am. Rep. 843.
Perkins v. Smith, 116 N. Y. 441.

(d) Some cases hold that when the members of a copartnership contract in their individual names as members of the firm this alone makes the contract joint and several. Yet in the contract at bar, in addition to being separately named and described as partners, each individually undertakes to perform the contract.

"Where a contract expressly sets forth that it is made by 'H. N. L. and S. J. A., doing business under the firm name of L. & A.' as parties of the first part, it is their joint and several contract."

Forst v. Leonard, 112 Ala. 296: 20 So. 587.

"A contract running in the name of 'R. W. H. and J. F. K. of the firm of H. & K.' was signed in the firm name. Held to be the contract of the individual members of the firm."

Helliker v. Francesco, 65 Mo. 598.

"A person who covenants in his own name is personally bound, though he state it to be of a representative character."

Steele v. McElroy, 33 Tenn. (1 Sneed) 341.

So also where parties of one part contract for themselves and their heirs, the contract is joint and several.

"Where in a building contract, 'the parties of the first part herewith promise and agree for themselves, their heirs, executors, administrators, to pay,' etc., they are individually liable, though the contract recite that it is 'by and between the trustees and building committee,' of a church and the party of the second part."

Sandyskowski v. Lark et al., 108 Mich. 500: 66 N. W. 371.

And even where parties agree "to become partners" it is held that the agreement is joint and several as between themselves.

"Where seven parties agree to enter into a partnership at a future day the language being, 'they have agreed to become

partners' " it was held one could sue four others who broke the contract.

"I do not perceive why the contract might not be regarded as a contract both joint and several; a contract by each party with all the others to enter into a partnership with all the others; also a contract between each one, with each or more of the others, that he will go into partnership with all the others. That would seem to be the effect. The interests of the parties seem to require it to be so regarded."

Goldsmith v. Sachs, 17 Fed. 726.

V.

ABLES WAS LIABLE FOR BREACH OF THE AGREEMENT. AN AGREEMENT EXECUTED BY ONE OR MORE PARTNERS, ON BEHALF OF THE FIRM, WITHOUT AUTHORITY, MAKES THOSE EXECUTING IT LIABLE FOR ITS BREACH.

(a) Ables was liable for breach of the agreement.

In the decision appealed from the Court held the question, whether the agreement was joint, or joint and several, still, "open for consideration," and says: "Courts sometimes classify agreements between several persons as 'incomplete' if not signed by all who are named in them. This is on the theory of an implied term that all are severally bound in case only of all signing. In looking at the present agreement we reach the same conclusion by applying the theory of an implied term and by looking at the words used and the intended object. * * * 'In order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of severalty contained in it.' 2 Chit. Cont. 11 Am. Ed. 1354. An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not

binding upon any one of them unless all execute or subsequently ratify the agreement."

Harrison v. Mugoon et al., 16 Haw. 339: Tr. pp. 235-6.

The above citation from 2 Chit. Cont. 11 Am. Ed. 1354, as used in the decision, apparently refers to the interpretation of contracts as to whether they are joint and several, or joint only, while as used by Chitty it referred to the interpretation of a contract as to whether the liability was several only, or joint and several, as with the context it reads: "If two or more persons, who have joined together in a contract 'covenant severally' or become 'severally bound,' it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate deed on the same paper. A joint action cannot, consequently, be maintained against the parties to such a contract, but each must be sued separately upon the separate contract made by each. But in order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words," &c.

2 Chitty on Contracts, (11 American Edition) 1354.

Although there is some obscurity as to what the Court decided in its opinion last quoted from, when we petitioned for rehearing on the ground that the court had overlooked the fact that although the contract was joint, yet a recovery could be had against Ables, Chief Justice Frear in his opinion on rehearing declares: "This ground is based upon a misapprehension of the view that the court took in its recent decision and which is set forth, clearly as it seems to us, on pages 338 and 339 (Tr. pp. 235-6) *ante*. That decision was based on the ground that the contract sued upon was incomplete, whether it was joint and several or only joint in form. Among other things the court said, on page 339 (Tr. p. 236): 'An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any of them unless all execute or subsequently ratify the agreement.'"

Apparently this makes it clear that the court has held that whether the contract be joint or joint and several, in either case no recovery as to Ables can be had since the contract was incomplete as neither the powers-of-attorney nor the partnership agreement authorized its execution. As the court says: "This is on the theory of an implied term that all are severally bound in case only of all signing." (16 Haw. 339: Tr. p. 235.)

This, we submit, is erroneous. The law is as follows:

(1) If an agreement is in form joint, and is executed by a portion only of the parties named in it—where those who executed did not undertake to bind those who did not do so along with themselves—the rule is:

"Where a bond, a deed, or other written instrument is executed by a portion only of those named in the body of the instrument as parties, the question whether those who have executed it are bound, depends upon the circumstances under which the instrument was delivered, and these may be proved by parol. But it rests upon the party who has signed and delivered the instrument, to establish that the delivery was intended to be in escrow."

Chouteau v. Suydam, 21 N. Y. 180.

See also to like effect:

Pawling v. U. S., 4 Cranch (U. S.) 219: 2 L. 601.
Ward v. Winslow, 4 Pick. (Mass.) 518, 520.
Mattoon v. Barnes, 112 Mass. 463.
Van Norman v. Barbeau, 54 Minn. 388: 55 N. W. 1112.
Ward v. Chum, 18 Gratt. (Va.) 801.
State v. Potter, 63 Mo. 212: 21 Am. Rep. 440.
Brittain v. Work, 13 Neb. 347: 14 N. W. 421.
Carter v. Moulton, 51 Kan. 9: 32 Pac. 633.

And if those who executed the agreement, in the manner last described, afterwards act upon it knowing it has not been executed by the others they are bound, and cannot maintain that they considered it an escrow after they so acted upon it.

Adams v. Bean, 13 Mass. 137.
Ward v. Winslow, ubi supra.

(2) If the agreement is in form joint and several and is executed by a portion only of the parties named in it—where those who executed did not undertake to bind those who did not do so along with themselves—the rule is:

"The signer of a joint and several bond cannot deny its binding obligation, even where it appears on its face to be drawn for the signature of others, and they are not annexed, unless he declared at the time that he would not be bound without such signatures were obtained."

Los Angeles v. Mellus, 59 Cal. 444.

See also to like effect:

Parker v. Bradley et al., 2 Hill (N. Y.) 584.
Cutter v. Whittemore, 10 Mass. 442.
Warring v. Williams, 8 Pick. (Mass.) 322.

Thus it appears that if on the face of the contract all are to be merely "severally bound," according to the citation from Chitty, *ubi supra,* it is "the same as if each of the covenantors had executed a separate deed on the same paper." And a joint action could not be maintained against them. If on its face they were to be jointly and severally bound, as we contend is the case in the agreement at bar—leaving out of consideration that each signed for himself and as agent for the others—each upon signing it would be bound unconditionally whether the others signed or not, "unless he declared at the time that he would not be bound without such signatures were obtained." *(Los Angeles v. Mellus, ubi supra.)* While if on its face the contract were joint only, it would rest upon those who "signed and delivered the instrument, to establish that the delivery was intended to be in escrow." *(Chouteau v. Suydam, ubi supra.)*

The authorities are, however, uniform that if an instrument is complete on its face, as is the agreement in the case at bar, it cannot be delivered to a grantee in escrow.

"A bond cannot be delivered to one of the obligees as an escrow."

Moss v. Riddle, 5 Cranch (U. S.) 351: 3 L. 123.
Miller v. Fletcher, 27 Gratt. (Va.) 403: 21 Am. Rep. 356.
Ryan v. Cooke, 172 Ill. 309: 50 N. E. 213.
11 Am. & Eng. Ency. of Law, (2nd Ed.,) 337, note 4 and cases there cited.

There is no evidence that after the agreement was signed, in its present form, that Ables, or any party to it, expected it to be executed by any other person, or to be submitted to the parties who signed it by attorney for approval, before it should be delivered as complete and acted upon. Moore had refused to sign it—with Ables' knowledge—when it was executed by his partners (Tr. pp. 65, 141). Ables received one of the several copies executed, as a complete contract, in its present form (Tr. pp. 57-8, 146); and, in pursuance of it, he sent the plaintiff at Sydney, a few days after its execution, the medicines and subscription of the original Hagey partnership to the Tasmania partnership (Tr. p. 62 and Tr. p. 168, Ex. I). He accepted the sheep and run as the consideration of the agreement, and sold them on October 10th, 1897, (Tr. pp. 66-7,) before the agreement could possibly have been submitted to the partners at Honolulu and their assent made known to those at Auckland. It was never contended at the trial that any of the partners in New Zealand made the agreement, subject to the approval of those at Honolulu; and the fact that they each signed for the partnership collectively, while the names of those at Honolulu were signed by attorney, showed that it was intended to be delivered and acted on before being submitted at Honolulu, as in the latter case it would have been sent to Honolulu for execution by the parties there.

Whether the agreement be joint and several, or joint, in either case, where a number of co-obligors apparently execute a bond or other contract, and it afterwards transpires as a matter of law that some of them are not bound, this will not relieve the others from their liability—even when each does not undertake to bind all—if the facts, which relieve those not liable, were known to their co-obligors when the latter signed.

"Upon a bail bond entered into by 'J. W.' who had been arrested on mesne process, 'as principal, and A. W., wife of said J. W. and G. D. as sureties,' the wife is not liable, but the other surety is. * * *

"The defendant Doane executed the bond with his principal and co-surety, and the co-surety is described in the bond as the wife of the principal. Thus he was informed of the facts, and is liable."

Yale v. Wheelock, 109 Mass. 502.

See also to like effect:

Allin v. Shadburne, 1 Dana (Ky.) 68: 25 Am. Dec. 121.
Pepper v. State, 22 Ind. 399.

(Other cases on this point, where an agent, without authority, to bind his principal makes himself personally liable, and where a partner, without authority to bind the firm, endeavors to bind it, are cited under the next sub-head.)

There is evidence to show that when Ables executed the agreement for himself "individually and the said company collectively," he was informed as to all matters of fact in connection with his own authority and that of those signing with him, as he knew of the powers of attorney held by Cowart and Kirkpatrick from Magoon and Emerson (Tr. p. 45), which were in exactly the same language as his power from McStocker (Tr. p. 158, Ex. B, and Tr. p. 168, Ex. J); and in his letter to McStocker of October 29th, 1897, (Tr. p. 162, Ex. E,) he says, "it is very fortunate for you, Magoon and others that I have been here," while on November 26th, 1897, (Tr. p. 196, Ex. 4,) he writes, "if you and Magoon think so don't hesitate to cancel my power of Att'y;" thus showing he was familiar with Magoon's relations to Cowart and Kirkpatrick, while Magoon knew the relation of himself to McStocker.

The Court also held in the original opinion (16 Haw. 339: Tr. p. 236): "An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any of them unless all execute or subsequently ratify the agreement."

The agreement at bar is not one of this kind, or merely a case of eleven persons jointly and severally agreeing to be partners —although in such a case if the agreement were signed by less than all, those of them who signed would be bound jointly if it were delivered unconditionally by them as complete in its partially signed condition, and if the word *"severally"* meant anything those that signed, by so doing, would deliver it unconditionally as to whether the others signed or not. It is a case of nine persons, who being partners, put in a joint consideration, agreeing jointly and severally, and each for himself and on behalf of the others, as parties of one part, with two others, who each put in a separate consideration, as parties of the other part, to form a second partnership.

In the former case, *if such an agreement were ever made—whatever it might mean*—each would agree for himself only and all the other partners jointly, and the partner sueing the joint obligors for breach thereof, would be sueing for the breach of an obligation he had himself with the others undertaken to perform,—that is he would be sueing the partnership of which he was a member—this he could not do at law, but he could sue one or more, who had undertaken, individually, that certain of the others would be bound, for damages, for failure of the others to be so bound; although the agreement would not be binding on their principals and thus incomplete so far as they were concerned. So, in the latter case either of the two partners can sue the other nine, or any of them, for breach of their obligation, as he is not one of them; and especially can he sue any of them, when each has undertaken individually that all the nine collectively will perform that obligation, and some of the nine fail to do so,—that is he can sue, at law, one or more of his partners upon an undertaking between him and them, as individuals, for breach thereof. *(Harrison v. Magoon,* 13 Haw. 361: Tr. p. 20.)

And in contracts where each agrees with all the others, and also with those of the others who stand in a certain position, if they are signed unconditionally, irrespective of delivery, those who sign are bound whether the others sign or not.

"A contract whereby the signers agree each with all the

others, and each with those who are or may become liable as indorsers on the paper of H. Co. to protect such indorsers in proportion to each stockholder's holding, being a several contract, it is no defense for one who signed it unconditionally, that others did so on condition that all the persons named in it should sign."

Taylor v. Matteson, 86 Wis. 113: 56 N. W. 829.

If the agreement at bar did not make the plaintiff a partner of all the defendants, it at least made him a tenant in common with them and a partner of those who personally signed it; and the latter class of defendants are estopped to deny, that what they sold him is what they undertook to buy back, because they misnamed it at the sale, as by the very terms of the agreement they were to give the value of £2000 in "exchange for the portion * * * taken by him." They cannot sell it to him as an interest in a partnership and afterwards say it is not what they sold because it turns out to be a tenancy in common.

"Although a new member cannot be admitted into a partnership without the consent of all parties, yet a person who has obtained a share in the concern can, after the partnership has expired, maintain a suit in chancery for his share of the profits."

Mathewson v. Clarke, 6 How. (U. S.) 122: 12 L. 370.

"No third person can be admitted into a partnership once formed without the concurrence of all the original members. One attempted to be admitted otherwise, becomes only the partner of him who attempts to admit him."

Fearns v. Tiernan, 4 Rob. 367.

"Where a partner without the consent of his copartners assigned his interest in the firm it was held: "The assignee becomes tenant in common only, and as such may have a right to an account and the proportion of the profits."

Kingham v. Spurr, 7 Pick (Mass.) 235, 238.

See also to the same effect:

Noonan v. Nunan, 76 Cal. 44.

Merrick v. Brainard, 38 Barb. (N. Y.) 574.

Leader v. Plante, 95 Me. 343: 50 Atl. 53.
Marx v. Goodnough, 23 Ore. 545: 32 Pac. 511.

(b) An agreement executed by one or more partners on behalf of the firm without authority makes those executing it liable for its breach.

Where four persons acting for a partnership of nine, contract to form another partnership with two other persons, and exceed their authority, they are liable for breach of that contract in the same way they would be liable for breach of any contract they might make on behalf of the partnership of nine, in excess of their authority, which has not been ratified by the remaining five, and more especially are they so liable, when each of the four individually undertake that the whole nine will perform the contract. In neither case would the contract be binding on the partnership attempted to be bound, but in the one case equally with the other the partners who make the attempt are liable.

"Damages may be recovered upon an agreement by one of several partners to introduce a stranger into the firm, although the agreement be entered into without the knowledge of the firm.

"It is sufficient consideration for such an agreement, that the stranger will become a partner."

Tindall, C. J., in deciding the case cited, said: "Three objections have been made to the plaintiff's right to retain his verdict: First, that no action lies on the contract disclosed by the evidence in this cause; and that objection divides itself into two considerations,—one, that the plaintiff was aware of the fact that other persons were already in partnership with the defendant, consequently that the defendant could not, without the consent of such persons, force a stranger into the firm; and that the plaintiff cannot seek to enforce a contract which at the time he knew to be impossible. But this is no answer in the mouth of the defendant; for he should have secured the consent of his partners before he ventured to enter into such a contract; or is bound, at all events, to obtain it afterwards. * * *

"Bonsanquet, J.: 'I think this verdict ought not to be dis-

turbed. It is objected, that the contract is of such a nature that the defendant could not perform it without the consent of his partners; but that does not discharge the defendant from his contract, for he ought not to have engaged in it unless he had secured that consent.' "

McNeild v. Ried, 9 Bing. 68: 10 Mew's Digest 406.

See also:

The Swallow Fed. Case No. 13,665 (Olcott, 334.)
1 Bates on Partnership, Sec. 349 and note 2.

(c) In a suit against a partnership for breach of contract, judgment may be had against the partners who made the contract without authority, although the firm is not liable.

Statutes now exist in nearly all the States which authorize a plaintiff to bring action against any or all of joint and several defendants and to have judgment against one or more of several defendants as justice may require. "The true criterion now is, whether a separate action might have been maintained. If it could, a several or separate judgment is proper."

Harrington v. Highham, 15 Barb. (N. Y.) 524.

Where statutes in like terms to those described above do not exist, there are statutes in most, if not all, of the states and territories, which the courts enforce to like effect.

11 Ency. Pl. & Pr. 854 and cases cited in note 4.

The principle stated in this sub-head is recognized in *Dowling v. National Exchange Bank of Boston,* 145 U. S. 512: 36 L. 795, and the right to recover judgments against one of several defendants is affirmed in *Sawin v. Kenny,* 93 U. S. 289: 23 L. 926; *Atlantic, &c., R. Co. v. Laird,* 164 U. S. 393, and *Allen v. Clayton,* 11 Fed. 73.

Other cases under the statutes just referred to state the law as follows:

"After the dissolution of a copartnership one of the partners, without authority, indorsed in the copartnership name a note payable to the firm, and delivered it to the plaintiff, who advanced his money on the credit of the indorsement. In a suit

brought against both partners on the indorsement, it was held: 1st—That a several judgment could properly be rendered under the statute against the defendant who made the indorsement.

2nd—*That this defendant was estopped from denying that the legal title to the note passed by the indorsement to the plaintiff.*

* * *

"It was the intent of the statute to apply to all actions founded on contracts the same rule, with regard to recovery against a part of the defendants, which prevails at common law in the case of actions founded on torts."

Dean v. Savage, 28 Conn. 359.

"A partner who executes in the firm name a contract not within the scope of the partnership business is bound thereby, although the firm is not liable thereupon.

"In an action upon contract against two defendants jointly, where one only is found liable, no amendment of the declaration is necessary before entering judgment against such defendant separately, as authorized by Pub. St. c. 171, sec. 5."

Taft v. Church, 162 Mass. 527: 39 N. E. 283.

See also to same effect:

Link v. Allen, 48 Tenn. (1 Heisk.) 319.
Clafin v. Butterly, 2 Abb. Pr. 446: 5 Duer (N. Y.) 327.
Marks v. Bard, 1 Abb. Pr. 63: 8 Howard Pr. 151.
Stedeker v. Bernard, 102 N. Y. 327.
Smith v. Straub, 41 Kan. 7: 20 Pac. 516.
Roberts v. People, 55 Mich. 367: 21 N. W. 319.
Moore v. Otis, 18 Mo. 118.
Roggenkamp v. Hargreaves, 39 Neb. 540.
Bailey Loan Co. v. Hall, 110 Cal. 490.
Kingland & Douglas M'f'g. Co. v. Mitchell, (Tex. Civ. App,) 36 N. W. 757.
Ah Lep v. Gong Choy and Tong Wing, 13 Oregon 205: 9 Pac. 483.
4 Am. & Eng. Ency. of Law, (2nd Ed.,) 635, note 7 and cases cited at the end of this note on page 636.

Where more partners than one, without authority, contract to bind the firm, they are liable for breach of the contract if the firm is not bound, and in a suit against the firm judgment may be had against the partners making the contract.

"Here the plaintiff sued the three defendants, alleging that they were partners. The proof was that the contract declared on was made by two of the defendants, but was not within the scope of the partnership, and hence no cause of action was proved against the third defendant. * * * The appellants' contention proceeds upon the erroneous idea that the action was not against the individuals composing the firm, but against the firm.

"Held that judgment was properly rendered against two."

Keigher v. Dowler, 47 Minn. 540: 50 N. W. 823.

Where two members, on behalf of the firm agreed, without authority, to submit a matter to arbitration, it was held: "A recovery may be had upon such an award, against the partners consenting to the submission, on a complaint against all the members of the firm, alleging a joint liability."

Harrington v. Highham, ubi supra.

See also to the same effect:

Third Nat. Bank of Sedalia v. Fults et al., 115 Mo. App. 42: 90 N. W. 755.

"The liability of one partner, or acts and contracts done and made by his copartners, without his actual knowledge or assent, is a question of agency."

Irwin v. Williar, ubi supra; Dowling v. Nat. Bank, ubi supra.

The authorities are uniform that where an agent, without authority, attempts to bind a principal, he is also personally liable for breach of the contract, if he uses apt words to bind himself.

1 Am. & Eng. Ency. of Law, 1120, et seq.
Story on Agency, 316, Sec. 265.

Hastings v. Lovering, 2 Pick. (Mass.) 214: 13 Am. Dec. 420.

Wilder v. Cowles, 100 Mass. 487.

Bell v. Teague, 85 Ala. 211: 3 So. 861.

Hull v. Brown, 35 Wis. 654.

Hegeman v. Johnson, 35 Barb. (N. Y.) 200.

Mathews v. Jenkins, 80 Va. 463.

Hinsdale v. Partridge, 14 Vt. 547.

Roberts v. Button, 14 Vt. 195.

Cruse v. Jones, 71 Tenn. (3 Lea) 66.

Taylor v. Shelton, 30 Conn. 122.

Hewitt v. Roudebush, 24 La. Ann. 254.

Meech v. Smith, 7 Wend. (N. Y.) 315.

Farmers Co-operative Trust Co. v. Floyd, 47 Ohio St. 525: 26 N. E. 110: 21 Am. St. Rep. 846: 12 L. R. A. 346.

Lewis v. Clarkin, 18 Cal. 399.

Hall v. Crandall, 29 Cal. 567: 89 Am. Dec. 64.

Seaver v. Colburn, 10 Cush. (Mass.) 324.

Also where more than one agent attempt, without authority to bind their principals, the authorities are uniform that the agents are personally liable for breach of the contract if they use apt words to bind themselves.

"Where, in a building contract, 'the parties of the first part herewith promise and agree for themselves, their heirs, executors, administrators, to pay,' &c., they are individually liable, though the contract recites that it is, 'by and between the trustees and building committee,' of a church and the part of the second part."

Landykowski v. Lark et al., 108 Mich. 500: 66 N. W. 371.

To same effect see:

Fredenhall v. Taylor, 23 Wis. 538: 99 Am. Dec. 203.

Henderson v. Martin, 19 Ark. 477: 70 Am. Dec. 606.

Rowland v. Phalen, 14 N. Y. Super Ct. (L Bosw.) 43.

Steele v. McElroy, 33 Tenn. (1 Sneed.) 341.

(d) A mistake of law does not relieve from liability.

When two or more partners are liable for breach of contract made by them, without authority, on behalf of the firm, the argument that each may have thought the other partner had authority to bind the firm does not state a ground for relieving them, as a mistake of law would not relieve them from liability, nor yet a mistake of fact not known to or induced by the plaintiff.

"What one party to a contract understands or believes is not to govern its construction, unless such understanding or belief was induced by the conduct or declarations of the other party."

Bank of Metropolis v. Kennedy, 17 Wall (U. S.) 19: 21 L. 544.

20 Am. & Eng. Ency. of Law (2nd Ed.) 813, 815.

Furthermore a partner, who with others, attempts to bind the firm, without authority, is estopped from denying the authority, which by his conduct he represents to exist; it was his duty to ascertain there was such authority before the contract was made.

McNeild v. Ried, 9 Bing. 86; *Dean v. Savage,* 28 Conn. 359, *ubi supra.*

22 Am. & Eng. Ency. of Law (2nd Ed) 55 et seq.

(e) Under the statutes of Hawaii, when a suit is brought for breach of a contract by a partnership, and it develops at the trial that some of the partners made the contract without authority to bind the firm, judgment may be recovered against the partners making the contract without authority, and this is especially true, when the partners contracting, agree for themselves individually and the firm collectively.

The Civil Laws of Hawaii, 1897, Sec. 1222 (Revised Laws of 1905, Sec. 1741,) reads: "It shall be necessary to join as defendants in civil actions, all the joint and several, or joint makers of promissory notes, or drawers of drafts, bills of exchange, or orders, or joint and several obligors, lessees, or parties of the first or second part to covenants, agreements and con-

tracts, in suing for non-payment, non-acceptance, or non-fulfilment thereof, but it shall in no case be necessary to serve all the joint parties sued with process."

It was either the intention of the legislature, when this section was passed, to change the common law rule, that joint and several obligors must either be all sued jointly or each alone severally, and to permit judgment to be recovered against any number of them that might be liable, in all cases where "a separate action might have been maintained," *(Harrington v. Higham, ubi supra)* or it was their intention to make all joint and several contracts practically joint by obliging a plaintiff to recover against all or none according to the common law rule which "has been changed by statute in most, if not all, of the states." (11 Ency. Pl. & Pr. 854, *ubi supra.)*

Furthermore, the law of Hawaii allowing amendments, is exceptionally liberal: "Whenever a plaintiff in an action shall have mistaken the form of action suited to his claim, the court or judge, on motion, shall permit amendments to be made *on such terms as it shall adjudge reasonable; and the court* or judge *may, in furtherance of justice and on the like terms,* at the trial or on appeal, or at any other stage, before or *after judgment, allow any petition* or pleading or process or proceeding *to be amended by* adding or *striking out the name of any party,* or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleadings or the proceedings to the facts proved."

Revised Laws of Hawaii, 1905, Sec. 1738.

When the Court, on demurrer in the case at bar, held, "it necessary for the plaintiff to join as defendants all of the parties of the first part to the agreement sued on in the first count," (13 Haw. 339, 361: Tr. p. 27), it must have considered it the intention of the legislature, when it made it mandatory to join all joint and several defendants, that the court should non-suit the plaintiff as to such of the defendants as were not liable and

allow him to proceed against the others. This was evidently the view taken by the trial court, and also by the defendants, as the motion for non-suit was made as to each of the four defendants on separate grounds and granted by the Court as to each of them, *by name,* without ordering a non-suit as to all the defendants, the Court also saying, "the plaintiff cannot maintain this action as against the defendants, who have been served or who have appeared in this action." (Tr. p. 148.) To argue that it was not sufficient for the plaintiff to except to the non-suit, but that it was his duty to move to have the pleadings amended by adding the names of Ables, Magoon, McStocker or Emerson, after non-suit as to them, in order that he might allege error in not being permitted to proceed against either of them separately after the non-suit had been granted as to some only of the other defendants as well as the one whose name he wished to add, is to say that an exception to a ruling of the Court is not sufficient to support an appeal; but that a counter motion must be made to reverse the action of the Court excepted to.

The Supreme Court of Hawaii also recognized, that this is the practice, in the case at bar, when it held (14 Haw. 532), "the recovery must be either against all who are jointly liable or against each of the persons separately upon his several liability." And again (16 Haw. 337: Tr. p. 235): "By declaring against all, however, he took the chances of being able to show that they had all executed the agreement, and was liable to 'be non-suited at the trial if he fail in proving a joint contract.' (1 Ch. on Pl. 51), unless this was an agreement binding upon the defendants severally as well as jointly." Finally, in deciding the petition for rehearing (16 Haw. 586: Tr. p. 262), the court ruled that the plaintiff was not non-suited as to all the defendants because it had overlooked the argument that even though the contract, "was joint a recovery could be had against some of the parties thereto if not against all," as, "the view that the court took * * * was based on the ground that the contract sued upon was incomplete."

The principle, that where more than one defendant is sued, the plaintiff may recover as to some only of them, has been

affirmed in Hawaiian cases. In *Dowsett v. Jones,* 9 Haw. 543, 547, as the trial court had given judgment against all the defendants when it should have been against only one, a new trial was ordered with leave to amend by striking out the name of the husband, especially in view "of the fact that the statute of limitations had become a bar to a new action," although the action was, "upon a joint promise and indebtedness of the husband and wife." The court thus recognized that the common law rule, that the plaintiff should be " 'non-suited at the trial if he fail in proving a joint contract' (1 Ch. on Pl. 51)" (16 Haw. 337: Tr. p. 235) had been changed by statute in Hawaii. The principle is recognized in *Testa v. Kahahawai,* 12 Haw. 254, 257.

In Texas where there is no statute authorizing judgment against one or more of several defendants, and it is not mandatory, but merely permissive to join defendants at the option of the plaintiff, it was held:

"In a suit against A., and B., on a draft, which on its face appears to have been executed by both of them as partners *in the firm name,* but which was executed by A., only, judgment may be rendered against A., and in favor of B., when it is shown under plea of *non est factum,* that the draft was not executed by B., or by his authority.

"The rigid system of the common law regarding forms of action which required the plaintiff to be non-suited if he sued two persons on a joint contract, and one of them showed himself not to be liable, has no application here."

Willis v. Morrison, 44 Texas 27.

See to same effect:

Moore v. Williams, 31 Tex. Civ. App. 287: 72 S. W. 223.
Congdon v. Monroe, 51 Texas 109.
Kingsland & Douglas Mfg. Co. v. Mitchell, (Tex. Civ. App.), 36 S. W. 757.

There are also numerous cases where defendants have been sued jointly, or jointly and severally, as partners or otherwise, where the liability is not alleged to be created by some on behalf

of all, in which judgment has been given against a portion of the defendants and in favor of a portion of them. See cases cited:

11 Ency. Pl. & Pr. 854 note 1.

This question is discussed in:

Bibb v. Allen, 149 U. S. 481, 505: 37 L. 819, 828.

(f) Ables was duly notified of the plaintiff's dissatisfaction with the condition of the partnership business in Tasmania.

The six months in which the plaintiff could exercise his option was to commence when the plaintiff devoted his time to the business in Tasmania, and departed from New Zealand for that purpose (Tr. pp. 127-8 and 159, Ex. C). It cannot be said he did this until January 17th, 1898. If the business in Tasmania had proved successful the defendants certainly would not have consented to plaintiff drawing salary as manager thereof for any period prior to January 17th, 1898.

If the six months commenced on January 17th, 1898, then, as Ables was served with the summons from New Zealand on July 23rd, 1898, (Tr. pp. 58, 87, 147, 221 and 171, Ex. M,) in the nature of things the summons must have been in transit before July 17th, 1898, when the six months ended.

The notice of dissatisfaction and the demand for stock of the value of £2000 the plaintiff made on Kirkpatrick on March 10th, 1898, (Tr. pp. 107-8, 139 and 188, Ex. T,) at Sydney, would also bind Ables provided the partnership is liable, *(Harrison v. Magoon,* 14 Haw. 425-6, 530-1); and even if the partnership collectively is not liable Ables, by contracting for himself individually and the partnership collectively, is estopped to deny, that notice to one of the partners bound, is notice to him.

"If an individual hold himself out to the world as a partner in a concern, he is liable as such, though he have no interest in it."

Benedict et al. v. Davis, 2 McLean (U. S.) 347: 3 Fed. Cases, Case 1293.

McGowan v. American Pressed Tan Bark Co., 121 U. S. 575, 591-2: 30 L. 1027, 1032-3.

22 Am. & Eng. Ency. of Law, 55, et seq., and cases cited in notes.

McNeild v. Ried and *Dean v. Savage, ubi supra.*

Furthermore, as the plaintiff did his "best to find" Ables, when he returned to Auckland after notifying Kirkpatrick of his dissatisfaction on March 10th, 1898, and was unable to do so; (Tr. p. 109)—since Ables had gone to Australia without even giving his address to his partners at Honolulu (Tr. pp. 54 and 196-7, Ex. 4)—and as he brought his suit in New Zealand before he knew Ables' whereabouts, or the addresses of the other defendants (Tr. pp. 109-110), and as Ables was served with the Summons on July 23rd, 1898, (Tr. pp. 58, 87, 147, 221 and 171, Ex. M,) within a reasonable time thereafter, Ables by not making his address, or even the part of the world he was in, known to the plaintiff, waived notice of dissatisfaction until the plaintiff by "the exercise of diligence in making inquiry for the residence," of Ables was able to find him.

"Judge Story enumerates the excuses of a general nature for failure to give notice * * * 5. The utter impracticability of giving notice, by reason of the party entitled thereto having absconded, or having no fixed place of residence, or his place of residence or business being unknown, and incapable of being ascertained upon reasonable inquiries."

Wade on the Law of Notice, 432, Sec. 976.

"All that is required of the holder * * * is the exercise of diligence in making inquiry for the residence or place of business of the party to be notified."

Idem 436, Sec. 990.

See to same effect:

4 Am. & Eng. Ency. of Law (2nd Ed.) 436.

It cannot well be said that the summons in the New Zealand suit was not both a notice and demand by the plaintiff (Tr. p. 171, Ex. M), nor that what would constitute waiver of notice

of dishonor of a negotiable instrument—concerning which the law of notice is most strict—would not constitute notice in connection with other contracts.

It was also sufficient to allege that demand was made and notice given on March 10th, 1898, as the delay in notifying Ables was through no fault of the plaintiff; but because Ables did not leave his address at Auckland, and the facts "excusing such delay may be proved under the averment that notice was given."

14 Ency. Pl. & Pr. 1070.

Firth v. Thrush, 8 B. & C. 387: 15 E. C. L. 242.

VI.

IF THE PLAINTIFF IS NOT ENTITLED TO RECOVER FOR BREACH OF CONTRACT, HE SHOULD BE ALLOWED TO AMEND HIS DECLARATION AND RECOVER ON A QUANTUM VALEBANT, AS IT WAS THE LAW OF THE CASE THAT HE COULD RECOVER AGAINST THE DEFENDANTS SEVERALLY AS WELL AS JOINTLY FOR BREACH OF CLAUSE 4; AND IF THAT HAS BEEN CHANGED HE SHOULD BE ALLOWED TO ADAPT HIS PLEADINGS TO THE CHANGE OF LAW, BECAUSE OF SURPRISE IN THAT HE COULD NOT ANTICIPATE SUCH CHANGE. HE SHOULD ALSO BE PERMITTED TO AMEND BECAUSE THE STATUTE OF LIMITATIONS HAS BECOME A BAR TO A NEW ACTION SINCE THE COMMENCEMENT OF THIS ACTION.

(a) The plaintiff is entitled to a new trial and to amend if there were no error in the judgment below.

The rule of pleading that a declaration on an express contract may be amended by adding a count on the implied contract to return the consideration in case of failure to prove the express contract, is elementary.

1 Ency. Pl. & Pr. 564-5, 583-4 and note 1.
Turnow v. Hockstadter, 7 Hun. (N. Y.) 80.
Copeland v. Johnson Mfg. Co., (Supreme Court), 3 N. Y. Supp. 42.

Cox v. McLaughlin, 76 Cal. 60.
Perrin v. Keen, 19 Me. 355.
Evans v. Warner, 21 Hun. (N. Y.) 574.
Rodrigue v. Currier, 15 S. & R. (Pa.) 81.
Bryce v. Massey, 35 S. C. 127: 14 S. E. 768.
Heath v. Whidden, 29 Me. 108.
Kuhn v. Brownfield, 34 W. Va. 252: 12 S. E. 519.
Dance v. McClure, 39 Vt. 196.
Bruns v. Schreiber, 48 Minn. 366.
Chicago Elc. R. Co. v. Bills, 118 Ind. 221: 20 N. E. 770.
Burnham v. Spooner, 10 N. H. 165.
Libley v. Young, 26 S. Car. 415.
Stephens v. Thompson, 28 Vt. 77.
Pierce v. Wood, 23 N. H. 519.
Stevenson v. Mudgett, 10 N. H. 336.

(A digest of the above cases on this point is made in the petition for rehearing; Tr. pp. 247-8.)

Such an amendment may be made although a new action on the same facts would be barred by the statute of limitations, as the facts set forth in the original declaration would be the same as those relied on for recovery under the amendment, and thus no new cause of action would be introduced.

1 Ency. Pl. & Pr. 621 and note 3.

Smith v. Missouri Pac. R. Co., 56 Fed. Rep. 458.
Smith v. Palmer, 6 Cush. (Mass.) 303.
Case v. Blood, 71 Iowa 632.
Telffner v. Dillard, 70 Texas 140.
Western Union Tel. Co. v. Brown, 62 Texas 36.
Abbott v. Chambers, 55 Mich. 410.
Baltimore Elc. R. Co. v. Gibson, 41 Ohio St. 145.
Ely v. Early, 94 N. Car. 1.

Myers v. Kirt, 68 Iowa 124.
Smith v. Bellows, 77 Pa. St. 441.
Bisley v. Pheonix, 2 Hun. (N. Y.) 349.
Thompson v. Swearengin, 48 Texas 555.
Hastings v. Kellogg, (Tex. Civ. App.) 24 S. W. 846.
Recton v. Alexander, 27 Texas 659.
Man de Hear v. Van Domseler, 56 Iowa 671.
Ball v. Clafin, 5 Peck. (Miss.) 303.
Wilson v. Wideham, 51 Me. 366.
Heath v. Whidden, 24 Me. 383.
Spencer v. Howe, 26 Conn. 200.
Boyd v. Bartlett, 36 Vt. 9.
Coxe v. Tilgham, 1 Whart. (Pa.) 282.
Hunt v. Taylor, 25 Ohio St. 620.
Harris v. Wadsworth, 3 Johns (N. Y.) 257.

(The cases last cited, with others, are digested on this point in the petition for rehearing; Tr. pp. 248-9, 251.)

Furthermore Revised Laws of Hawaii, 1905, Sec. 1738, (quoted *supra* V, e) is exceptionally liberal in its terms and provides: "Whenever a plaintiff in an action shall have mistaken the form of action suited to his claim * * * the court * * * may * * * at the trial or on appeal, or any other stage, before or *after judgment,* allow any petition * * * to be amended * * * by inserting other allegations material to the case, when the amendment does not substantially change the claim or defense, by conforming the pleadings * * * to the facts proved."

It is the practice under statutes like this, in a proper case, after judgment, to allow an amendment, and vacate the judgment "in order to give the opposite party an opportunity to controvert the new allegations."

1 Ency. Pl. & Pr. 605-6-7, and cases cited.

The Supreme Court of Hawaii held in the opinion on the petition for rehearing, under review, (16 Haw. 488: Tr. p. 264): "The difficulty is that no error has been found in the judgment

below, and in the absence of error that judgment cannot be reversed merely for the purpose of allowing an amendment and making it effective."

On this point there seems to be some difference of opinion, as where the facts, that have been both pleaded and proved, would justify a recovery by the appellant, although to avoid a variance the pleadings may require amendment—as they might so require in the case at bar if this Court were to hold the plaintiff could recover for a quantum valebant alone—if justice require it, this Court will order a new trial, even after judgment against the appellant, with leave to him to amend. Whether or not such action constitutes the reversal of a judgment in which "no error has been found" is thus a purely academic question.

When judgment had been given for the plaintiff in an action to quiet title, it was held, that "if justice appeared to require it," an amendment by the defendant might be allowed.

Jones v. Meehan, 175 U. S. 1, 28: 44 L. 49, 60.

"When the facts of the case show the plaintiff to have an equitable title to relief, this Court, while it may be unable to afford such relief upon the case made by the bill, may remand the case to the court below for an amendment of the pleadings, and such further proceedings as may be just."

Wiggins Ferry Co. v. Ohio & M. R. Co., 142 U. S. 396: 35 L. 1055.

In *Balcom v. Woodruff,* 7 Barb. (N. Y.) 14, it is stated: "The general rule is that a party who has not applied for an amendment until after he has been non-suited, is too late to ask for a new trial in addition to an amendment. But where a plaintiff has been non-suited at the circuit, on the ground that his declaration contained no count adapted to the nature of the case, it appearing that the defendant had not been misled; that the cause had been once tried without any objection having been made; that the statute of limitations had attached; and that such relief would be manifestly in furtherance of justice, the court allowed the plaintiff to amend his declaration *nunc*

pro tunc, and set aside the non-suit, on the payment of costs." And after remarking that the plaintiff had not moved to amend at the trial but had insisted he was entitled to judgment against the defendant liable, if both defendants could not be held, on page 17 *Idem* the court says: "We think therefore, that the non-suit was rightly granted, and we have no power to set it aside on the ground of an erroneous decision of the judge at the circuit." And again on 18 *Idem*, "In this case we may give the plaintiff the benefit of a presumption that he was taken by *surprise*, inasmuch as the case had been once tried without any such objection having been taken."

In *Holmes v. Seely*, 17 Wend. (N. Y.) 75, after the trial court had granted a non-suit on the ground of a variance, a new trial was ordered, although the court held the non-suit was not erroneous, but intimated, it would have been preferable, "to permit the plaintiff to take a verdict notwithstanding a misdescription of the estate or premises claimed, and leave him to apply to the court for permission to amend so as to conform to the proof."

In *Meadow Company v. Christ Church*, 15 N. J. L. 52, a non-suit was set aside on appeal and a new trial ordered although the court held: "I think the Chief Justice did right in non-suiting the plaintiff." And again: "The mistake or error is in the original declaration, and non-suit was, therefore, properly granted."

Other cases on this point are:

Nelson v. Ayres, 11 N. J. L. 62.
Trask v. Duval, 24 Fed. Case No. 14,143, (4 Wash. U. S. 97).

(b) The judgment of non-suit, now under review, was, however, erroneous under the law of the case, whether the agreement was binding on none of the defendants unless it was binding on all, or not.

The agreement had been held joint and several in the decision after argument on demurrer (13 Haw. 360: Tr. p. 26), as an

instruction to the trial court, and this was affirmed after verdict (14 Haw. 425-6), while the court held in deciding upon the petition for rehearing after verdict, that the plaintiff could recover either "against all who are jointly liable or against each of the persons separately," and that the only thing which prevented Ables from being liable, when Magoon, McStocker and Emerson were not bound, was that: "The notice and demand relied upon was shown to have been made upon Kirkpatrick alone." Hence when, at the succeeding trial, now under review, the plaintiff proved the necessary notice to Ables, the judge was bound by *The Law of the Case* to find Ables severally liable, even if the defendants were not jointly so, and, therefore, to grant a nonsuit as to Ables was erroneous.

"When a case has been once decided by this Court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the *law of the case,* and must carry it into execution, according to the mandate. That Court cannot vary it or examine it for any other purpose than execution; or *give any other or further relief;* or review it, *even for apparent error,* upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."

Re Sanford Fork & Tool Company et al., 160 U. S. 247: 40 L. 414, 416.

Sibbard v. United States, 12 Pet. (U. S.) 488, 492: 9 L. 1167, an equity case, and *Texas & P. R. Co. v. Anderson,* 149 U. S. 237, 37 L. 717, a common law case, are cited in support of the last quotation.

"Inferior tribunals are bound by the conclusions of the supreme court, and cannot treat them as dicta on the theory that the questions determined were not properly raised by the record, and were not necessary to the determination of the case."

Gibson v. Chouteau, 7 Mo. App. 1.

The Supreme Court of Hawaii was also bound to hold that Ables was severally liable, if the defendants were not jointly so,

by the law of the case, the notice to him having been proved. And even if their last decision that the contract was incomplete was correct in law, it was erroneous as contrary to the law of the case and the plaintiff is entitled to a new trial.

"As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this Company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the state bonds had been sold, the decision was in no just sense *dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.*"

Florida Cent. R. Co. v. Schutte, 103 U. S. (13 Otto) 118: 26 L. 327.

Other cases on this point are:,

U. S. v. The Nuestra Senora De Regla, 108 U. S. 92: 27 L. 662, 666.

Kennicott et al., 94 U. S. 498: 24 L. 260.

Illinois v. Illinois C. R. Co., 184 U. S. 77, 91, 92: 46 L. 440, 447.

"Where the Supreme Court, in reversing a judgment and remanding the cause for a new trial, consider and pass upon a point of law, with a view to the new trial for the purposes of which it is important, the ruling upon such point, though not essential to the decision, becomes the law of the case in all its future stages."

Table Mt. Tunnel Co. v. Stranahan, 21 Cal. 548.

Adams et al. v. Fisher et al., 75 Texas, 657: 6 S. W. 772.

Hawley v. Smith, 45 Ind. 183.

Hiatt v. Brooks, 17 Neb. 33: 22 N. W. 73.

Sharpstein v. Friedlander, 63 Cal. 78.
Bridgeforth v. Gray, 39 Miss. 136.
Alexander v. Worthington, 5 Md. 471.
Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 58.
Louisville R. R. Co. v. County Act, 33 Tenn. (1 Sneed.)

637: 62 Am. Dec. 424.

"A construction put upon a written contract by the appellate court will be adhered to as the law of the case in the same litigation."

3 Am. Dig. Century Ed. Column 2363, citing numerous cases.

Even if this court should hold that the contract was incomplete, the plaintiff is entitled to an opportunity to amend and declare for a *quantum valebant,* as, at the time of trial, he was justified in believing that the Supreme Court of Hawaii was bound by the law of the case, and he could not then foresee that it might be changed by this Court, which was only given such jurisdiction on March 3rd, 1905. The situation thus comes within that described as *surprise in Balcom v. Woodruff, ubi supra,* as the plaintiff had no reasonable ground before the trial to anticipate that such an amendment would be necessary, and the assurance of the *then* law of the case that it was not so.

As to what constitutes surprise see:

McGuire v. Drew, 83 Cal. 225.
Gidionsen v. Union Depot R. Co., 129 Mo. 401.
United Security Life Ins. & Trust Co. v. Ott, (N. J. E.) 26 Atl. 923.
Simpkins v. Simpkins, 14 Mont. 386: 36 Pac. 759.
Bennett v. Jackson, 34 W. Va. 62: 11 S. E. 734.
27 Am. & Eng. Ency. of Law, (2nd Ed.) 549, 550.

It is true that there is no statute in Hawaii, as there is in many states, making surprise a ground for relief against a judgment; but equitable defenses are allowed in the practice there, even when set up by the plaintiff to rebut presumptions for the defense.

"This court has in many instances inclined to admit equitable principles into law actions, and on this ground alone might well admit proof in an action to recover the purchase money, to rebut the *prima facie* evidence of the statement in the deed."

Morris v. Petero, 4 Haw. 23, 29.

Surprise was considered as a ground for new trial which was applied for by the plaintiff in *Kaimiola et al. v. Beni et al.*, 5 Haw. 294.

Other cases of equitable defenses are:

Heeia Sugar Co. v. McKeague, 5 Haw. 101.
May v. Haalelea, 2 Haw. 191.
Kamohai v. Kahele, 3 Haw. 530.

See cases cited Revised Laws of Hawaii note to Sec. 1736.

As the facts proven show a good cause of action against at least some of the defendants the plaintiff's right to amend should receive special consideration as the statute of limitations has become a bar to a new action.

Balcom v. Woodruff, ubi supra.
Dowsett v. Jones, ubi supra.
Sherman v. Harrison, 7 Haw. 664.
1 Ency. Pl. & Pr. 518-9.

VII.

THE DECISION OF THE SUPREME COURT OF HAWAII TO ONLY CONSIDER THE PLAINTIFF'S EXCEPTIONS TO THE DISMISSAL OF THE MOTION FOR NEW TRIAL, WHICH THE TRIAL COURT REFUSED TO HEAR ON ITS MERITS, IS NOT A GROUND FOR THIS COURT TO REFUSE TO CONSIDER THE ERRORS NOW ASSIGNED.

(a) The judgment should be reversed because the trial court did not consider it had power to order a new trial.

The motion for new trial was dismissed not because there had been no errors of law at the trial, but because the trial court

considered it had no power to order a new trial, as it refused to consider the motion on the grounds, "(1) that a motion for a new trial was improper in the case of a decision and judgment of non-suit, and (2) that no notice of a motion for a new trial was given by plaintiff at the time of the decision and judgment of non-suit." (Tr. pp. 208, 221). The Supreme Court of Hawaii decided that the trial court erred in not passing upon the merits of the motion for new trial (16 Haw. 170: Tr. pp. 224, 231); and in this decision no error has been alleged. In such a case this court will consider the question that the trial court refused to pass upon, and reverse the judgment, if necessary, when due exceptions have been taken to the trial court's refusal to consider the matter, as in the case at bar (Tr. p. 221).

"The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error *(Henderson v. Moore,* 9 U. S. 5 Cranch, 11: 3 L. 22; *Newcomb v. Wood,* 97 U. S. 581, 24 L. 1085), but in the case at bar the district court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken and the question of admissibility thereby preserved. * * * These affidavits were within the rule, and being material, their exclusion constitutes reversible error. * * * We should, therefore, be compelled to reverse the judgment because the affidavits were not received and considered by the court."

Mattox v. United States, 146 U. S. 140: 36 L. 917.

(b) The granting of a motion of non-suit is not a matter within discretion of the trial court, and if the trial court's action in so doing is properly brought by Bill of Exceptions before the court whose decisions this court reviews, this court will review the action of the court hearing the Bill of Exceptions, although in hearing such Bill of Exceptions the intermediate court professed to be reviewing a motion for a new trial.

After the Supreme Court of Hawaii decided that the trial court erred in not passing upon the merits of the motion for

new trial (Tr. pp. 224, 230: 16 Haw. 170), it decided it could only consider the trial court's refusal to consider the motion for a new trial (Tr. p. 231: 16 Haw. 332-3-4), and then passed upon the merits of the judgment of non-suit, alleging that it was reviewing the trial court's action in passing upon the motion for new trial, as the merits of the judgment of non-suit was the only thing that the record showed was before the trial court on the motion for a new trial. In fact the trial court neither passed upon the judgment of non-suit nor any other errors of law alleged when the motion for new trial was presented. Thus, as the trial court did not review the judgment of non-suit on the motion for new trial, the Supreme Court of Hawaii in reviewing the judgment of non-suit did not review the action of the trial court in reviewing that judgment on the motion for new trial, but actually reviewed the judgment of non-suit as given at the trial, whatever it said it was reviewing. In any event, the granting of an order of non-suit is not a matter within the discretion of the trial court, and, consequently, its action thereon is reviewable by this court if the matter has been properly presented, by a Bill of Exceptions authenticated by the trial judge, to the court whose action this court reviews, and considered by that court, and this is so even though that court were *ostensibly* only considering the dismissal of a motion for new trial.

"The actual decision of a Federal question in denying a rehearing is sufficient to give jurisdiction on writ of error to a state court from the Supreme Court of the United States, although an attempt to raise that question for the first time on motion for rehearing is usually too late.'

Missouri K. & T. R. Co. v. Elliott, 184 U. S. 530: 46 L. 673.

And where the record shows that a question, the decision of which is not a matter of discretion, has been presented to, *and passed upon by,* the courts below, even if it has been presented to the trial court on motion for new trial alone, this court will review the decision on such a question.

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226: 41 L. 979.

Meyer v. Richmond, 172 U. S. 82: 43 L. 374.

Missouri K. & T. R. Co. v. Haber, 169 U. S. 613: 42 L. 878.

The following case is in point as to the right of this court to review a decision reviewing the decision of a motion for new trial which reviews the judgment of the trial court.

"A preliminary question is presented by the defendants in error: They insist that no Bill of Exceptions was taken at the trial, and that, therefore, no rulings of the trial court are before us for consideration, citing as authority the case of *Kerr v. Clampitt,* 95 U. S. 188: 24 L. 493. In that case, as in this, after the trial a statement of the errors alleged, upon which a motion for a new trial was based, was prepared and filed; but, although signed by counsel, it was held by this court to be not the equivalent of a Bill of Exceptions, and to be available only for the purpose expressed, to-wit, the motion for a new trial. There was in that case no stipulation that the statement should be treated as a Bill of Exceptions, or be available for other purposes than that of a new trial. It was not authenticated by the trial judge. *Lacking that authentication,* it was adjudged available only for the purpose named; and that it did not bring into the record, for review in this court, the questions presented. In this case the proceedings on the trial are embodied in a statement prepared like that for the purpose of a motion for a new trial; but, in addition, it is authenticated by the trial judge as a correct statement of the proceedings. Further than that, at the trial a Bill of Exceptions was prepared in respect to the rulings of the court on instructions, signed by the trial judge and filed at the time, which Bill of Exceptions was incorporated in the statement. So that we have a separate and perfect Bill of Exceptions as to the rulings of the court on the matter of instructions; and a statement of all the proceedings in the trial, approved by counsel and authenticated by the trial judge. This proceeding was authorized by the statutes of Montana, and must be adjudged as sufficient for the purposes of review here."

Montana Ry. Co. v. Warren, 137 U. S. 348: 34 L. 681.

It has never been contended, in the case at bar, that the excep-

tions were not saved at the trial or the Bill of Exceptions not duly authenticated by the judge; but the only irregularity alleged was that the bill was not presented within twenty days after final judgment, as required by statute, although it is admitted it was duly presented within twenty days after the disposal of the motion for new trial and the further time allowed by the court.

(c) According to the statutes of Hawaii the judgment of the trial court did not become final, so that the twenty days within which the Bill of Exceptions had to be presented to the trial judge would commence to run, until the motion for new trial was disposed of, and the Supreme Court of Hawaii erred in not considering all the exceptions presented by the bill.

The judgment of non-suit was made November 9th, 1903, (Tr. p. 220), the motion for new trial filed November 14th, 1903, (Tr. pp. 208, 220),—within the ten days allowed by law (vide decision 16 Haw. 170: Tr. p. 222, in this part of which no error is alleged)—and dismissed January 16th, 1904, (Tr. pp. 208, 221), and the stipulation extending the time (Tr. p. 209) in which to present the Bill of Exceptions was filed January 20th, 1904, within the twenty days allowed by Session Laws 1903, c. 32, s. 18 (Revised Laws of Hawaii, 1905, sec. 1864), which reads: "Such exceptions * * * may at any time within twenty days after final judgment, or such further time as may be allowed by the judge, be incorporated in a Bill of Exceptions and presented to the judge." (Revised Laws, Sec. 1864, was amended March 29th, 1905, but the amendment does not affect this case). The transcript was completed July 25th, 1904, (Tr. p. 149,) and the Bill of Exceptions presented on August 6th, 1904, (Tr. p. 222,) within the twenty days allowed by the stipulation (Tr. p. 209). Hence, if the twenty days did not commence to run until the motion for new trial was disposed of then the Bill of Exceptions was presented in time to have not only the exceptions to the dismissal of the motion for new trial reviewed, but all the exceptions taken during the trial so reviewed, and the judgment which says, "that

the only exception in the bill which was presented within the time required by law is that which was taken to the dismissal of the motion for a new trial," (16 Haw. 334: Tr. p. 232,) is erroneous.

The statute on this subject in S. L. 1898, Act. 40, Sec. 2, and in the Civil Laws of 1897, Sec. 1438, was as follows: "A party may allege exceptions to any such opinion, direction, instruction, ruling, or order, and the same being reduced to writing in a summary mode, and presented to the judge during the term or within ten days thereafter; or, in case of proceedings in vacation as of the term, within ten days after the opinion, direction, instruction, ruling or order objected to, and being found conformable to truth, shall be allowed and signed by the judge; but if the judge shall refuse to allow and sign such exceptions, the truth of the allegations therein contained, may, nevertheless, be established before the Supreme Court; and the exceptions allowed by it; provided, that further time may be allowed by the judge in his discretion."

This statute was amended April 22nd, 1903, (S. L. 1903, c. 32, s. 18) so that it read as printed in Revised Laws of Hawaii, 1905, Sec. 1864, and in that form the law applied when the judgment of the trial court was rendered on November 9th, 1903, (Tr. p. 220,) and the motion for new trial dismissed January 16th, 1904, (Tr. pp. 208, 221). The changes made by the amendment of April 22nd, 1903, were, that the exceptions to the "opinion * * * or order," had to be "presented to the judge within ten days after the opinion * * * or order objected to," in any event, whether during term or otherwise, while the following sentence was added, "provided further, that if such exceptions are reported by a stenographer or entered in the judge's minutes, they need not be written out or presented to or allowed or signed by the judge within such time, but may be written out at the request of the party taking such exceptions, and allowed and signed by the judge and filed with the clerk at any time, and any such exceptions, whether so reduced to writing in a summary mode and allowed and signed by the judge, or so written out whether allowed or signed or not,

or filed with the clerk or not, may at any time within twenty days after final judgment, or such further time as may be allowed by the judge be incorporated in a bill of exceptions and presented to the judge, and, being found conformable to the truth, shall be allowed and signed by him, and if he shall refuse to allow and sign the same, the truth of the allegations therein contained, may, nevertheless, be established before the supreme court and the exceptions allowed by it."

The Supreme Court of Hawaii seems to have overlooked the last quoted sentence of the statute, which was added in 1903, as, having held that an exception would lie to the ruling on the motion for new trial, "whenever it was made," it goes on to say (16 Haw. 172: Tr. p. 225): "Under the circumstances the reasonable view would seem to be to consider the motion for a new trial as a 'proceeding,' and not as a part of the 'trial,' and the judgment in that proceeding as the decision therein, rather than the judgment entered previously after the trial and before the motion for a new trial was filed." And again (16 Haw. 334: Tr. p. 232): "The motion for a new trial, although properly made, as held in the previous decision *(Ib.* 176) did not suspend the judgment or operate as an extension of time within which to incorporate such exceptions in a bill or present the same to a judge."

The statute as it stood before the amendment of 1903 permitted the appellant to take his exceptions to any "opinion, direction, instruction, ruling or order," whether it were a final judgment or not (with certain reservations concerning interlocutory judgments not pertinent to this inquiry) to the supreme court, if it were done within ten days after the term, or, if in vacation, within ten days after the "opinion * * * or order;" and the sentence added in 1903, if it meant anything, was intended to give him the right after "final judgment"—or after the last exercise of jurisdiction by the trial court in the matter—to take his exceptions to all the "opinions * * * or orders," rendered prior to that "final judgment," in one bill of exceptions to the supreme court, without taking from him the right to have his exceptions to any of those "opinions * * * or orders," presented and allowed within ten days thereafter without wait-

ing for "final judgment." Between April 22nd, 1903, when the amendment was made allowing the Bill of Exceptions to be presented after "final judgment," and January 16th, 1904, there was no decision of the Supreme Court of Hawaii as to, at what stage of the trial such "final judgment" occurred. Hence the matter was without Hawaiian precedent when the question at bar arose.

According to the decision appealed from there were, under the statute, two "final judgments," as distinguished from "opinions * * * or orders," in the case at bar, as exceptions to, "opinions * * * or orders," had to be presented within ten days, and those to "final judgments," within twenty days, and that decision says (16 Haw. 172: Tr. p. 225), "the bill of exceptions, in so far as the exception to the dismissal of the motion for a new trial is concerned, was made up and presented to the judge within the time limited, for the extension of time was obtained within *twenty days* after the decision upon that motion." And again (16 Haw. 334: Tr. p. 232): "We are of the opinion that the only exception in the bill which was presented within the time required by law is that which was taken to the dismissal of the motion for a new trial. The remaining exceptions, which were taken to rulings during the trial, were not 'incorporated in the bill of exceptions and presented to the judge' within twenty days after final judgment."

To have two final judgments in one trial seems a contradiction in terms, and shows the fallacy of the reasoning in the decision appealed from.

There appears to be no precedent for the interpretation of the term "final judgment" in the decision at bar, as it was contrary to the evident intent of the statute as then amended, and to the settled interpretation heretofore put upon it by the courts, as the authorities appear to be uniform that where an appeal is given after "final judgment" as distinguished from other "opinions * * * or orders," not interlocutory, and a motion for a new trial is made: "There is no final disposition of the case, and no final judgment rendered from which an appeal can be taken until it is disposed of."

2 Ency. Pl. & Pr. 137.

This point was passed upon by this court in *Kingham & Co. v. Western Mfg. Co.*, 170 U. S. 675: 42 L. 1192. In that case the statute provided that, "no appeal or writ of error by which any order, judgment or decree may be reviewed * * * shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed;" while another clause gave the court power "to review final decisions," and it was held that the latter clause provided "an exception to the general rule, and while the language" of the former clause referred to "the entry of the order, judgment or decree, yet the meaning must be confined to final orders, judgments or decrees." Consequently the court reversed the order of the Circuit Court of Appeals which dismissed an appeal from a judgment which had been taken within six months after the motion for new trial had been disposed of but not within six months after the judgment had been entered.

In the case at bar the statute gives the appellant twenty days after *"final judgment"* and not merely a certain period *"after the entry"* of judgment, and unless *"final judgment"* meant when the case passed out of the jurisdiction of the trial court by the decision of a motion for new trial or the like, the amendment of 1903 would be practically meaningless as the statute as it stood before that time allowed exceptions to be taken from all other kinds of judgments.

Other cases on this point are:

Brockett v. Brockett, 2 How. (U. S.) 238: 11 L. 244.

Aspen M. S. S. Co. v. Billings, 150 U. S. 31: 37 L. 986.

Texas & Pac. Ry. Co. v. Murphy, 111 U. S. 488: 28 L. 492.

Northern Pacific R. Co. v. Holmes, 155 U. S. 137: 39 L. 99.

In *Tullis v. Lake Erie & W. R. Co.*, 105 Fed. 554, it is decided that where judgments do "not take final effect for the purposes of a writ of error * * * there is no good reason for saying that the time for settling a bill of exceptions, the

necessity for which could not be known sooner, had passed."

It is true in *Armijo v. Armijo*, 181 U. S. 558: 45 L. 1000, when the territorial court refused to consider a bill of exceptions, because it had not been authenticated by the stenographer or judge: "No compliance with the territorial law or with the rules of the court relating to the authentication of testimony" appearing by the record—this Court held: "This matter of practice in the courts of the territory is based upon local statutes and procedure and we are not disposed to review the decision of the supreme court in such a case." And again in *Sweeney v. Lomme*, 22 Wall. (U. S.) 208: 22 L. 727, when a provision in the Practice Code had been interpreted "differently by different state courts" it was held: "Without expressing any opinion of our own on the question, we hold that as it is one which arises under their own Code of Practice, we should, *in this conflict of authority*, adopt the ruling of the Supreme Court of Montana in the consideration of it."

But, in the case at bar, the court refused to consider the exceptions to the judgment taken at the trial, not because there was any failure to comply, "with the territorial law or with the rules of court," but did so contrary to the express language and unquestionable intent of the statute, concerning the interpretation of which there has never been any conflict of authority, and which can bare no two constructions.

(d) A writ of error is the proper method by which to review the judgment of the Supreme Court of Hawaii in the case at bar.

Kingham & Co. v. Western Mfg. Co., ubi supra.

Ex parte Baltimore & O. R. Co., 108 U. S. 566: 27 L. 812.

Ex parte Railway Co., 103 U. S. 894: 26 L. 461.

Ex parte Pennsylvania Co., 137 U. S. 451, 453: 34 L. 738.

Respectfully submitted,

T. M. Harrison,
Plaintiff-in-Error, Pro. Se.

W. R. Castle, David L. Withington and *A. G. M. Robertson*, for the Plaintiff-in-Error.

FILE COPY.

JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. M. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

SUPPLEMENTARY BRIEF FOR THE PLAINTIFF-IN-ERROR.

T. M. HARRISON,
Pro Se.

W. R. Castle, David L. Withington and *A. G. M. Robertson*, for the Plaintiff-in-Error.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. M. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

SUPPLEMENTARY BRIEF FOR THE PLAINTIFF-IN-ERROR.

The plaintiff-in-error in this brief will only touch on points raised by the briefs of the defendants-in-error and not covered by plaintiff-in-error's first brief, hereinafter referred to as plaintiff's brief.

THE MOTION TO DISMISS.

The first ground for the motion to dismiss, is that the decision

to which the writ of error, now at bar, was sued out is not a final judgment.

Revised Laws of Hawaii, Section 1627 provides: "The supreme court shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."

Section 1628 provides: "The supreme court shall have appellate jurisdiction to hear and determine all questions of law, or mixed law and fact, which shall be properly brought before it on exceptions," etc.

Section 1865, provides, that upon the allowance of a bill of exceptions from a circuit court, "the questions arising thereon shall be considered by the supreme court," and that judgment may be entered and, "arrested pending such exceptions."

Section 1867, provides: "When judgment has been entered in any cause in which exceptions have been allowed, the judgment may be vacated by the supreme court without any writ of error in like manner as if it had been entered by mistake, and thereupon such further proceedings shall be had in the cause as to law and justice shall appertain."

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered."

Mower v. Fletcher, 114 U. S. 127:29 L. 117.

Such was the condition of the judgment in the case at bar. It was not necessary to even, "require the inferior court to perform the ministerial act of entering the judgments in that court which had been ordered," (Mower v. Fletcher, ubi supra) as the judgment of the inferior court became enforceable by operation of law when the exceptions were overruled.

Other cases which recognize this principle are:

Gregory v. McVeigh, 23 Wall. (U. S.) 294:23 L. 157.

Fisher v. Perkins, 122 U. S. 522:30 L. 1192.

The exceptions finally disposed of the questions raised thereby, and they could not be again reviewed by the same court. (See *Notley v. Brown,* 17 Haw. 455). It has also been held

in *Cummings v. Iaukea,* 10 Haw. 1, that the six months within which a writ of error may be sued out from the Supreme Court of Hawaii commences to run from the entry of judgment in the lower court and not from the overruling of the exceptions thereto; and that: "A writ of error and bill of exceptions are concurrent methods for the correcting of errors made in the lower courts—the conditions and limitations in each method being different." Thus, when the decision at bar was rendered, not only were all collateral modes of reviewing the judgment of the Circuit Court, whether by motion for new trial or writ of error, barred by lapse of time, but that decision was final on the points excepted to and terminated the "litigation between the parties on the merits."

The Act of March 3, 1905, provides: "That writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States," but does not grant a review by this Court of the proceedings in the Circuit Courts of Hawaii, hence cases like *Green v. Van Buskirk,* 3 Wall. (U. S.) 448:18 L. 245, are not in point.

II.

With regard to the second ground for the motion to dismiss, it has been repeatedly held by this Court, that the question of the finality of a judgment for review by Federal Courts is not affected by local procedure, and thus only Federal cases are authorities on this point.

Chateaugay Ore and Iron Co., Ex Parte, 128 U. S. 544:32 L. 508.

Andes v. Slauson, 130 U. S. 435:32 L. 989.

Bronson v. Schulten, 104 N. S. 410:26 L. 797.

Missouri Pac. Ry v. Chicago & R. R., 132 U. S. 192:33 L. 309.

It has also been repeatedly decided here, that when an act of Congress changed the right of appeal from judgments, that such judgments, concerning which petitions for rehearing were

pending when the change occurred, were appealable according to the changed conditions.

Voorhees v. Noye Mfg. Co, 151 U. S. 135:38 L. 101.
Northern Pacific R. Co. v. Holmes, 155 U. S. 137:39 L. 99.

III.

With regard to the third ground for the motion to dismiss, the right of this court to review the errors assigned is argued in plaintiff's brief on pages 63 et seq.; but some points not fully presented there are raised in *Sparrow v. Strong,* 4 Wall. (U. S.) 584.

In that case this Court denied a motion to dismiss and only refused to review the order affirming the denial of a new trial when it discovered there was nothing before the appellate court other than the affirmance of the order denying the motion for new trial and concluded, upon examining "the record further," that *under the practice in Nevada,* "the decision of the District Court in such a case was the exercise of a discretion * * * And * * * that the decision of the appellate court was equally an exercise of discretion upon the law and the facts." (4 Wall. (U. S.) 584, 588:18 L. 413).

Under the Hawaiian statutes and practice the decision of a motion for new trial based on errors of law is not a matter within the discretion of the trial court.

When a motion for new trial, on the ground the verdict was against the weight of the evidence, was presented for review, it was held: "The question presented to us is not precisely that presented to the trial judge on the motion for new trial, but rather whether that judge exercised a sound judicial discretion in granting the motion. *This is the rule where the motion is not founded upon errors of law.*"

Macfarlane v. Lowell, 9 Haw. 438.

The same principle is recognized in:

Smith v. Hamakua Mill Co., 14 Haw. 669, 678.
Stone v. Hutchinson, 4 Haw. 117.
George v. Holt, 9 Haw. 135, 136.

Since, in the case at bar, the trial court did not pass upon

the motion for new trial and overrule it—as alleged in defendants' motion to dismiss—but held it had not power to decide the motion, (Tr. 208, 221); it is apparent the appellate court did not review the discretion of the trial court, as the trial court had refused to exercise discretion or to pass upon the motion, but it proceeded to review the judgment of nonsuit rendered at the trial, and having sustained that judgment, it held that any failure to exercise discretion by the trial court on the question of new trial was immaterial.

THE BRIEF OF DEFENDANTS, J. A. MAGOON, F. B. McSTOCKER AND DOROTHEA EMERSON.

DEFENSE I.

The Supreme Court of Hawaii decided in the case at bar (16 Haw. 170: Tr. p. 225) that a motion for new trial was proper after involuntary nonsuit from the inherent right of Courts to review their own judgments, as well as for other reasons (*14 Ency. Pl. & Pr.* 718, 932) and this seems to be the practice elsewhere where there are no statutes to the contrary (14 Ency. Pl. & Pr. 831 and note). This matter was again ruled on in:

Roe v. McGrew, 17 Haw. 596.

DEFENSE II.

The instructions received by plaintiff at Sydney were a part of the business in Tasmania, and unsatisfactory features in them necessarily belonged to that business. Plaintiff's decision to proceed with the business after he received the instructions shows he was determined to give it a fair trial, so far as the means at his disposal would allow, no matter how discouraging the outlook was. And his uncontradicted testimony shows he did his utmost to make that business satisfactory (Tr. p. 138). It does not make the plaintiff's dissatisfaction any the less bona fide because he endeavored to convince himself it was mistaken after it first arose. The defendants have not produced any

cases to show that a party who has contracted to prosecute a business believing it to be different from what it is represented has not ground for dissatisfaction—both legal and otherwise—if he afterwards learns he has been deceived into contracting to prosecute a humbug, nor is he obliged to believe the business a humbug when he first has reason to conclude it is such, but it is his privilege, if not his duty, to test the matter. This point is passed upon in: 14 Haw. 418:426.

DEFENSE III.

Because plaintiff's salary was a first charge on the receipts of the business it did not debar him from collecting it from other sources if there were no receipts.

Plaintiff was to be made sole judge of whether or not the business was satisfactory. The conduct of O'Brien, the efforts the plaintiff made to start the business, his lack of success and his knowledge that the defendants would advance no more money in the matter were enough to cause him bona fide dissatisfaction (Tr. pp. 104-5-6-7), while its total lack of success elsewhere might have convinced him of the futility of wasting more time or money on the matter. If the question of plaintiff's dissatisfaction is not disposed of by his uncontradicted testimony it is a matter for the jury.

DEFENSES IV AND V.

As to the right of the defendants to contract to sell stock whether at the time they owned it or not see:

Bibb v. Allen, 149 U. S. 481:37 L. 81[illegible]

Irwin v. Williar, 110 U. S. 499:28 L. 225.

The phrase "market value" has but one meaning, while plaintiff's testimony shows (Tr. pp. 121-2) why the contract to deliver stock instead of cash was made, why the defendants had the option to deliver it within their sphere of business, and that the word stock meant any kind of corporation stock. The evidence must be considered most favorable to the plaintiff on a motion for nonsuit.

DEFENSE VI.

It is not necessary that the consideration should move from the promisee to the promisor so long as it moves to someone at the request of the promisor (6 Ency. of Law 686); and, furthermore, if it was represented that the consideration did not move directly to all the defendants, yet in fact it did so, and by accepting and retaining the consideration with full knowledge of all the facts they are bound. If Ables took the sheep as his own and disposed of them as such and the defendants at Honolulu wish to maintain Ables had no authority to make the contract and they did not ratify it, they should have refused to accept the proceeds of the sale of the sheep Ables made on their behalf, or if they did not know all the details of that contract when they received those proceeds they should have returned the proceeds when they learned the details.

DEFENSE VII.

The sheep were conveyed in consideration of all the promises in the contract.

DEFENSE VIII.

This matter was disposed of in plaintiff's brief, pages 30 to 53. Neither Moore nor Powter have appeared in the action at bar and defenses can not be made on their behalf unless they submit to the jurisdiction of the Court.

DEFENSES IX, X AND XI.

This matter is treated of in plaintiff's brief, pages 1 to 30. If the defendants in Auckland exceeded their authority to the extent here complained of it does not appear that these matters were unknown at Honolulu, and, at least, the plaintiff had reason to believe they were known as the partnership articles of April 10th, 1897, (Tr. pp. 156-7-8) provided for accounts of all transactions being sent to Honolulu "every month, or oftener if necessary." Thus these very actions were evidence of the

confidence and authority that had been placed in the partners at Auckland since no steps were taken to repudiate their authority.

It appeared nowhere in the partnership articles of 10th April, 1897, that the fund for starting the business was anything less than $105,000, nor is there any evidence that the plaintiff, or anyone not a party to that contract, knew that fund was less than $105,000 before this action was tried.

The defendants on page 30-1 of their brief allege it is a very different thing to contend a partner had authority to create a liability for a small amount from contending he had authority to create a liability, "which might ruin all his co-partners." It is submitted the creation of a $10,000 liability in the conduct of its business is not unreasonable or excessive for a partnership with a capital of $105,000, and, in any event, it is a question for the jury.

The defendants contend (brief page 26) that the partners at Honolulu had no authority to acquire a ranch, and yet declare at page 32 of their brief, that the powers of attorney were necessary to the partners in New Zealand for "the disposition of any real estate the company might acquire."

The cases cited by the defendants under these heads are not in point in that they do not refer to the conduct of unusual business in foreign countries or refer merely to the interpretation of the language of instruments without considering the conduct of the parties.

DEFENSE XII.

Moore's knowledge of the agreement sued on was not a matter of the details of the business in New Zealand, and, furthermore, it does not appear that the defendants inquired of Moore concerning that agreement, as was their duty, considering both the knowledge they had of it and of what had been done in New Zealand by their partners. (See Plaintiff's Brief, pp. 22-26).

The cases cited by the defendants under this head are chiefly those where the agent paid money, he had obtained by false representations of authority, to the principal in satisfaction of his

own private debts, and not as money received in his capacity as agent, the distinction between this class of cases and that at bar appears in a case cited on page 39 of defendants' brief, *Baldwin v. Burrows,* 47 N. Y. 199, 212, which reads:

"Furthermore, according to their statement, they (the principals) had not received the money as their own, or as arising from a dealing between them and the plaintiffs through Blanchard as their agent, but as the money of Blanchard, in receiving which they dealt with him as a principal."

There can be no question that their proportional share of the £500 received from the sale of the sheep was either paid to the defendants in dividends or spent in the conduct of the partnership business for their benefit (Plaintiff's brief, pages 26-30), while there is no evidence—as alleged on page 40 of defendants' brief—that the plaintiff would have refused any portion of the £500 if it had been tendered to him, and credited it on the defendants' liability, whatever that may be.

The retaining of plaintiff's property is certainly a prejudice to him, and cases which hold: "Acts that amount to acquiescence must be such as to prejudice a party who claims the benefit of them," are not in point.

Lester v. Kinne, 37 Conn. 9, quoted from in defendants' brief, page 41, is not in point. It was an equitable action for the specific performance of the conveyance of real estate, the amount in dispute, $100, was small; and the Chancellor found that the respondent Coon had conveyed the land he had contracted to convey for the money received, according to his understanding of the agreement at the time of payment; and that the other lot, it was alleged Kinne, without authority, had agreed Coon should convey for that money, was promised under an oral agreement void by the statutes of frauds, besides this the court seems to have considered the fact, that the respondents' testimony was contrary to the Chancellor's findings. It was a very different thing from an action for breach of an agreement to return the consideration, or its value, if the property sold is returned. Furthermore, the agreement at bar is in writing, and the plaintiff returned what he had received under it when

he delivered the business in Tasmania to O'Brien, the agent of the defendants (Tr. pp. 103-107, 141-2).

This case in no way refutes the authorities cited in plaintiff's brief, pages 26, 27 and 28.

DEFENSE XIII.

Notice to one partner is notice to all (22 Ency. of Law, 139). See Plaintiff's brief, page 53.

DEFENSE XIV.

As Ables sold the sheep on the 10th of October, 1897, (Tr. p. 67) and did not write to Harrison sending him the medicines and instructions until the 12th of October, 1897 (Tr. p. 62 and Tr. 168 Ex. I) and as Harrison did not telegraph to stop the sale of the sheep before he received the instructions (Tr. p. 102) his telegraphs could not have affected the sale.

When sheep are sold and delivered for the price of the wool on their back and £50 paid on the contract price of £500, no amount of diligence will render such a contract void in New Zealand, whatever it might do elsewhere.

DEFENSE XV.

The consideration for the agreements of Sept. 16th and Sept. 21st, 1897, (Tr. pp. 97-98-178-180 Ex. O. & P.) was the conveyance of the sheep, a portion of which were subject to a lien, while the further consideration for the agreement of October 1st, 1897, was the release of that lien. (Tr. pp. 97-8 & 182-3 Ex. O. & R.) This question is passed upon in 14 Haw. 418, 426.

MISCELLANEOUS.

The reference of 1 Ency. of Law 1127, that an agent is not personally liable if he contracts as such with a party who knows his lack of authority refers, as is shown by the notes and the context, to cases in which the person dealing with the agent knows facts which affirmatively show his lack of authority, and the agent does not represent he has other authority, and not to cases where the agent represents or guarantees he has authority or makes himself personaly liable for the performance

of the contract. In the case at bar there was nothing in either the partnership articles or the powers of attorney to show that the partners in New Zealand did not have authority to make the contract sued on, while they not only guaranteed they had such authority by making the contract, but when the plaintiff saw the partnership articles and powers and wanted a further guarantee (Tr. p. 98) than was given by the first two contracts (Tr. pp. 178-180 Ex. O. & P.) they undertook individually to perform the contract in the new agreement. *Story on Agency, Ninth Edition, Revised by Greenough,* page 316, section 265, states the rule more accurately:

"This doctrine, however, as to the liability of the agent, where he contracts in the name and for the benefit of the principal, without having due authority, is founded upon the supposition that the want of authority is unknown to the other party, *or, if known, that the agent undertakes to guarantee a ratification of the act by the principal.*"

This principal is recognized in *Dowling v. National Exchange Bank of Boston,* 145 U. S. 512:36 L. 795, *Harrington v. Higham,* 15 Barb. (N. Y.) 524, *McNeild v. Ried,* 9 Bing 68, and numerous cases of partners being personally liable on contracts made on behalf of the partnership without authority cited in plaintiff's brief, pages 36 to 53.

BRIEF FOR THE DEFENDANT ABLES.

ARGUMENT I.

As to a summons being notice of a claim see *Bishop on Contracts,* section 832.

It is stated at page 14 of this brief concerning the individual liability of Ables: "It is to be noted at the outset that all plaintiff's cases are cases of joint and several bonds." We submit an examination of plaintiff's brief will show this is far from correct.

ARGUMENT II.

Whatever the law may be with regard to the judgment of a sister state being a merger of the cause of action on which it is brought, all the United States and State authorities, with the ex-

ception of Illinois and Louisiana, hold that the judgment of a foreign country creates no such merger.

"As the original debt is not merged in a judgment rendered in a foreign court, a certified copy of such judgment may be used as evidence by either party, in a suit on the original cause of action, without a formal allegation in the pleadings; and if it settles the whole controversy between the parties it ought to be held conclusive."

New York, &c. R. Co. v. McHenry, 17 Fed. 414.

"The fact that assumpsit lies on a foreign judgment is decisive that the demand has not passed into a security of a higher nature, so as to operate as a technical merger."

Lyman v. Brown, 2 Curtis 559:15 Fed. Case 8627.

See to the same effect:

13 Ency. of Law 1016.

Black on Judgments, 847.

1 Herman on Estoppel and Res Judicata 591.

This case has been twice tried since the declaration was amended by omitting the count on the New Zealand judgment, and in the decisions of the Supreme Court of Hawaii on both trials no reference or holding appears that the contract sued on was in any way merged in that judgment.

It is erroneously stated on page 13 of plaintiff's brief, that the petition for rehearing was filed January 24th, 1905, when in fact, as appears by the transcript on page 260, it was filed January 18th, 1905.

The following case on surprise was omitted from page 63 of plaintiff's brief:

Davies v. Hackfeld, 6 Haw. 181.

Wherefore the plaintiff-in-error submits the judgment of nonsuit should be reversed as to each and all of the defendants-in-error and a new trial ordered.

Respectfully submitted,

T. M. HARRISON,
Pro. Se.

W. R. Castle, David L. Withington and *A. G. M. Robertson,* for the Plaintiff-in-Error.

FILE COPY.

DEC 28 19

JAMES H. McKE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON,
Plaintiff in Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, AND GEORGE D. MOORE.

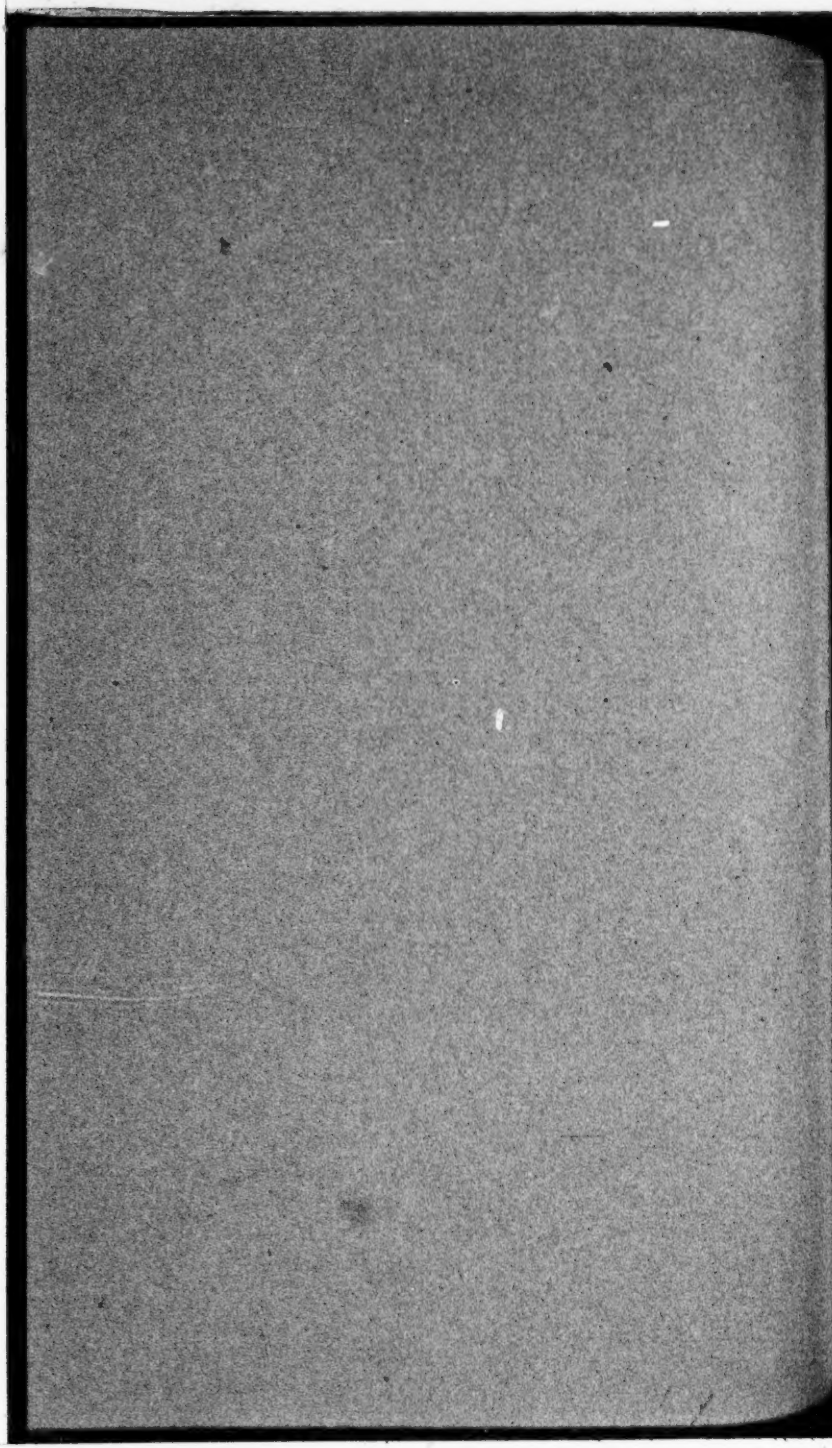
MOTION TO DISMISS.

BRIEF ON MOTIONS TO DISMISS.

THE FACTS.

J. A. MAGOON,
F. B. McSTOCKER,
DOROTHEA EMERSON,
Pro se.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON,
Plaintiff in Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, AND GEORGE D. MOORE.

MOTION TO DISMISS.

And now comes J. A. Magoon, F. B. McStocker and Dorothea Emerson, defendants in error above named, and move this court to dismiss the writ of error.

This motion is based upon the ground that this Court is without jurisdiction to hear and determine said writ of error for the following reasons:

First. There is no final judgment of the Supreme Court of the Territory of Hawaii herein which can be reviewed by this Court on writ of error.

Second. The decision of the Supreme Court of the Territory of Hawaii overruling the exceptions of plaintiff, was filed therein on the 19th day of December, 1904, at which time there was no statutory provision for a writ of error to the Supreme Court of the Territory of Hawaii from this Court to review the matters and things set forth in this action.

Third. That the only question reviewed by the Supreme Court of the Territory in the decision aforesaid was the order of the trial court overruling plaintiff's motion for a new trial and no writ of error lies from this Court to review said order.

Dated Honolulu, T. H., December 1, 1906.

Alfred Magoon

F. Burbridge

Dorothea Emerson

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON,
Plaintiff in Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, AND GEORGE D. MOORE.

BRIEF ON MOTIONS TO DISMISS.

THE FACTS.

The case was tried before a jury in the Circuit Court of the First Circuit, Territory of Hawaii, and on November 9th, 1903, an order of non-suit was entered therein. The case was then taken to the Supreme Court of the Territory on Bill of Exceptions, said Supreme Court refused to consider any exceptions except that relating to the refusal of the trial court to grant a new trial; and after a hearing in that court, the exception was overruled by a decision entered on December 19th, 1904. A motion for a rehearing was filed in said Supreme Court which motion was denied on March 6th, 1905. A petition for allowance of writ of error was filed in the Supreme Court of the Territory on May 26th, 1905, and the writ of error issued out of this Court on August 14th, 1905. On March 3rd, 1905, an act was passed by the Congress allowing

writs of error and appeals from the Supreme Court of the Territory to this Court in all cases where the amount involved, exclusive of cost, exceeds the sum or value of Five Thousand Dollars.

QUESTIONS OF LAW.

The only question of law involved in this motion is, does a writ of error lie in this matter? The question may be considered under three heads.

1st. Is the decision of the Supreme Court of the Territory overruling plaintiff's exception a final judgment on which a writ of error of this Court will lie?

2nd. Does the act of March 3, 1905, authorize the issuance of writ of error in a case decided by the Supreme Court of the Territory on December 19th, 1904, when a decision denying a rehearing was filed on March 6, 1905?

3rd. Does a writ of error lie on the decision of the Territorial Supreme Court affirming the trial court in its refusal of a new trial?

FIRST.

As to the first question, it has been decided by the Supreme Court of the Territory in a recent case (Meheula vs. Pioneer Mill Company, Limited, 17 Hawn. 91) that there is no statutory authority in the Territory for the entry of a final judgment on overruling bill of exceptions. In that case defendant's exceptions had been overruled by the Supreme Court of the Territory, and a motion for a rehearing denied. The defendants thereupon moved the court "that a final judgment be entered herein in this court affirming the judgment of the Circuit Court of the Second Circuit. * * * This motion was denied. The court says:

"It cannot be supposed that an affirming judgment supersedes the judgment affirmed. It is when a judgment is disaffirmed, or using the correct phrase, is vacated, that another judgment takes its place.

"But a judgment in an action at law is neither affirmed nor disaffirmed by this court in passing upon exceptions other than by vacating a judgment when entered, which, when exceptions are sustained, may be done by this court 'without any writ of error in like manner as if it had been entered by mistake.' R. L. Sec. 1867. If the exceptions are overruled nothing further is required but to notify the circuit court, in the form of a remittitur. Although judgment in an action at law formally concluded, 'wherefore it is considered by the court here that the plaintiff have and recover,' or otherwise as the case may be; yet this does not mean that the court makes the judgment which is merely a conclusion of law from a verdict, or in a jury waived case, from the judge's findings. A bill of exceptions, unlike a writ of error or an appeal, does not bring the entire case or its record to this court. We have merely to decide whether the exceptions are good or bad. If they are overruled, that is the end of the functions of this court relating thereto, nothing remaining but the order, notice or remittitur, on receipt of which the judgment in the circuit court if it had been entered but suspended pending the exceptions by the provisions of Secs. 1861 and 1865, R. L., remains in full force, requiring no affirmance or other recognition from this court. If no judgment was entered on the verdict it is entered by the circuit court upon notice of the overruling of the exceptions. This result follows as a matter of law and not in consequence of any direction of this court. The records of the case and all papers filed in the circuit court are, it is true, often sent here with the bill of exceptions as in appeals and writs of error, but the practice is incorrect. When causes are appealed or brought here on error, we have before us the entire record and may 'review, reverse, affirm, amend, modify or remand for new hearing in Chambers such decision, judgment or decree in whole or in part and as to all or any of the parties;' in cases of appeal, R. L., Sec. 1860, or in cases of error 'the Supreme Court shall have power to enter such judgment in the case as in their opinion the facts and law warrant.' Ib. Sec. 1883. The defendant contends that under the Revised Laws, Section 1630, this

court has the power 'to make and award all such judgments, decrees, orders and mandates * * * as may be necessary to carry into full effect the powers which are or shall be given to it by the laws or for the promotion of justice in matters pending before it.' This court has by law no power in overruling exceptions to make a judgment in the case tried in the circuit court and such judgment is not required 'for the promotion of justice in matters pending before it,' for nothing is pending. In Tibbets v. Pali, 15 Haw. 137, judgment was entered in the circuit court, August 29, 1899, and exceptions were overruled June 9, 1905. The plaintiff then brought a writ of error which was quashed because not sued out within six months from the rendition of the judgment, the court citing with approval Cummins v. Iaukea, 10 Ib. 3, where 'judgment on the verdict was entered on May 25, 1894; exceptions had been overruled and there was nothing left to be done to perfect the judgment.' In Hind v. Wilder S. S. Co., 13 Ib. 176, an appeal from a decree in admiralty, the court said that under the statute relating to the powers of this court in appeal cases it 'has always exercised its discretion as to entering final decrees or remanding cases' referring to the statutes and practice elsewhere by which 'appellate courts usually have power either to enter final, complete decrees themselves, or to remand cases to the lower courts.' If such discretions were granted by law to this court in overruling exceptions, there would be no occasion for the defendant to 'strongly contend that if the exercise of its discretion will prevent harassing and technical objections from being thrown in defendant's way in the exercise of its legal right to appeal, then this court should exercise that discretion so as to facilitate the exercise of that right.'

"The practice in Massachusetts, as fixed by statute, gives the Supreme Court power to enter judgment in cases of exceptions as of appeals, ordering the record to be removed to the Supreme Court. Mass. Pub. St. 832.

"The defendant refers to the fishery cases of Damon and of Carter v. Territory, in which final judgments were entered by this court upon overruling exceptions. 14. Haw. 465. The defendant says, 'The Damon case was passed on by the Supreme

Court and the Carter case is now pending. A holding that the court was without power to enter those judgments would render them absolutely void and such result should be avoided if possible.' We are not aware that objection was made to the entry of judgment in those cases. If it was done, inadvertently or without contest it has not the force of precedent. We are of the opinion that this court can take no other action on overruling the exceptions than to authorize the usual remittitur. The motion is denied."

"A decree of affirmance without taxation of costs and without specifying the sum for which it is rendered is not a final decree."

Wheeler vs. Harris, 13 Wall. 51, 20:531.
The Lucille vs. Respass, 19 Wall. 3, 22:64.

"Though the merits of the cause have been substantially decided, while anything, though formal remains to be done, this court cannot pass upon the subject."

Life & Fire Ins. Co. of N. Y. vs. Adams 9 Pet., 571, 9:234.

"A judgment cannot be regarded as final for the purposes of jurisdiction until entered in a court from which execution can issue."

Green vs. Van Buskirk, 3 Wall 448, 12:245.

"Where no further proceedings were had in the state court except a verdict, and motion for new trial overruled, and no judgment was entered on the verdict, there is no final judgment and this court has no jurisdiction of the case."

National Life Lns. Co. vs. Scheffer, 26 L. Ed. 1110.

"If the finality of the decree is a question of doubt, and it was treated by the court below as not final, and it is only in the Supreme Court of the United States that the finality of the decree is claimed, the doubt will be resolved against its finality."

McGourkey vs. Toledo & O. C. R. Co., 146 U. S. 536.

SECOND.

It is submitted that the statute of March 3rd, 1906, does not authorize the issuance of a writ of error to review a decision of

the Territorial Supreme Court filed on December 19th, 1904. This would be to give the statute in question a retroactive effect. The fact that the motion for a rehearing was denied three days after the passage of the statute, makes no difference. This is not a case where the pendency of a motion for rehearing suspended the running of the time within which a writ of error may be allowed for the reason that at the time when the case was decided, there was no statute stating any time within which a writ of error might be allowed.

"Statutes are to be considered prospective unless the language is such as to show that they were intended to be retrospective."

Warren Manuf. Co. vs. Etna Ins. Co. Fed. Cases, 17206.

In re Billing. Fed. Cases, 1408.

Ellis vs. Connecticut Mut. Life Ins. Co., 8 Fed. 81.

THIRD.

The plaintiff's bill of exceptions to errors alleged to have been committed at the trial was not filed within the time provided by statute of the Territory, and the Territorial Supreme Court refused to consider any exception except that relating to plaintiff's motion for a new trial. The allowance or overruling of a motion for new trial is a matter that cannot be reviewed by this court.

"Where the judgment of the Supreme Territorial Court affirms the order of the District Court denying a motion for a new trial, it is now reviewable here on error."

Sparrow vs. Strong. 4 Wall Wall., 584.

Respectfully submitted,

Alfred Magoon

W. Burchard

Dorothea Emerson

Dated Honolulu, December 11. 1906.

FILE COPY

NO. 107

IN THE

Office Supreme Court, U.
FILED.
JAN 4 1907
JAMES H. McKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1906.

THOMAS MILNER HARRISON,

vs.

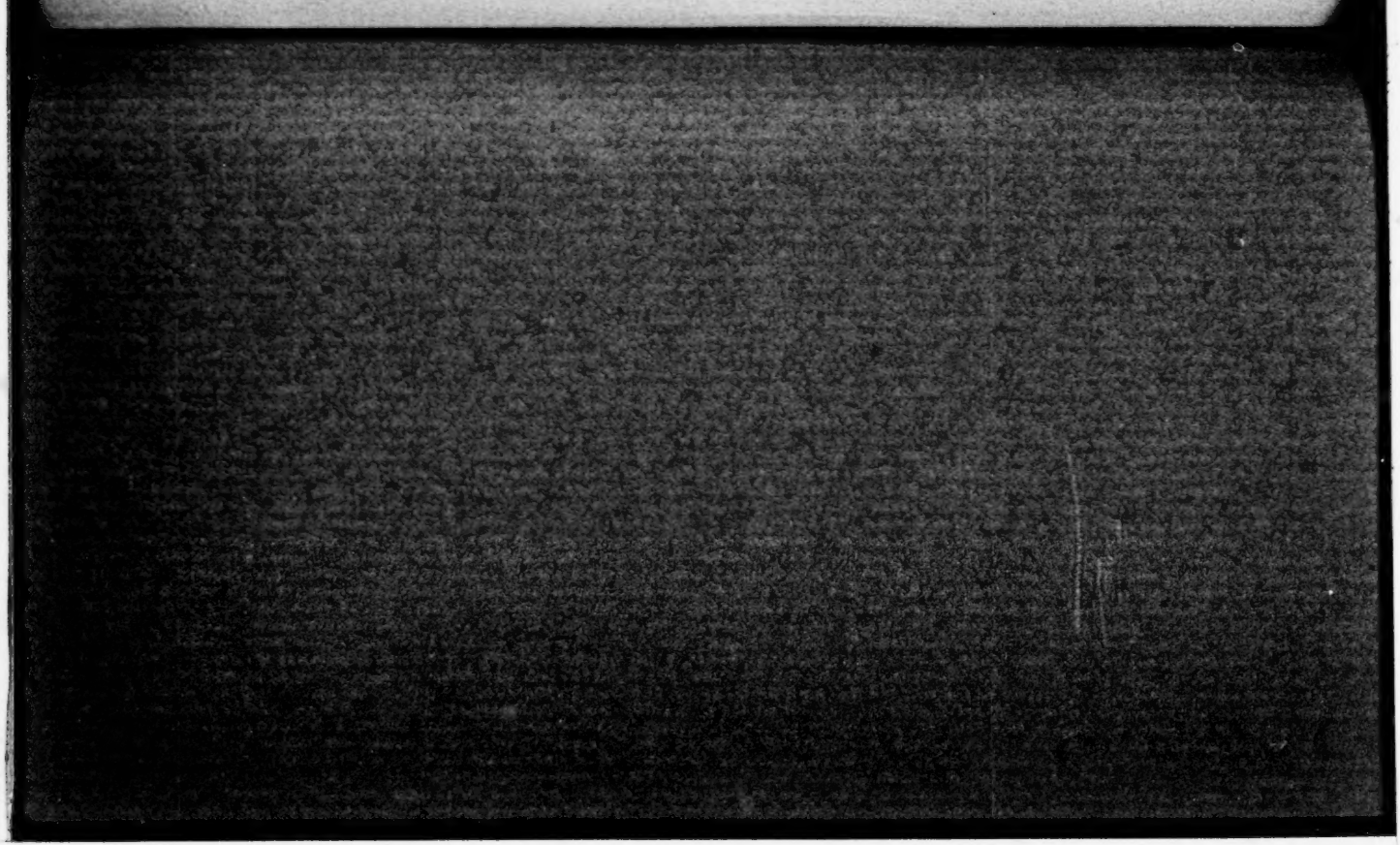
J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,

Defendants-in-Error.
Plaintiff-in-Error,

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT-IN-ERROR, L. C. ABLES.

E. B. McCLANAHAN,,
Attorney for Defendant in Error, L. C. Ables,
S. H. DERBY,
Of Counsel.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

THOMAS MILNER HARRISON,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,

Defendants-in-Error.
Plaintiff-in-Error,

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT-IN-ERROR, L. C. ABLES.

We shall endeavor to present this case briefly and concisely, though we shall try to answer all points affecting the liability of the Defendant Ables, as far as the burden rests on him to answer them.

RE PLAINTIFF'S STATEMENT OF FACTS.

There are certain statements of fact made by the plaintiff, which we desire to qualify, both as to the facts themselves and the inferences drawn from them.

THE SUB PARTNERSHIPS BEFORE THAT WITH HARRISON: As to the partnership with Wolfenden, he was a rival preacher and was bought out by giving him an interest in the Hagey partnership. No *guarantee* to him of any sum was made and no additional liability incurred, so it is wholly unnecessary to consider whether the Honolulu partners were cognizant of his coming

in or not. As regards the other subpartnership, Ables expressly says: "I did not think enough of the scheme to sign any of the papers" (Transcript p. 193). And Magoon and Mrs. Emerson say in a letter: "Messrs. Cowart and Kirkpatrick have signed or are about to sign, an agreement, guaranteeing to certain gentlemen in Auckland ten per cent. on an amount of money to be invested in the business. In a moment of enthusiasm they have appeared entirely to overlook the fact that according to our agreement they cannot bind the members of the company in any way, I think that immediately the fact is put before them they will see the necessity of explaining to these gentlemen that they had exceeded their authority, as Miss Lamb and I refuse to be bound by any such agreement on their part" (Transcript Pages 198-199). No theory of acquiescence in any sub partnerships at all resembling that with Harrison can bind the defendants who were in Honolulu, when the partnerships were formed.

THE HARRISON AGREEMENT: Magoon, McStocker and Emerson only signed this through attorneys not authorized to sign it, and A. E. Powter, one of the partners, did not either sign or afterwards ratify it.

HARRISON'S KNOWLEDGE OF THE CONTENTS OF THE ARTICLES OF PARTNERSHIP AND POWERS OF ATTORNEY: When the completed agreement was executed Harrison undoubtedly knew of these. It was only at the time of the "first draft" that he did not and "when I afterwards saw them I wanted some changes made." See also opinion of Perry J. on first trial of this case 14 *Haw.* at Page 422.

COWART'S LETTER TO MAGOON EX. L: Plaintiff relies on this and so do we. It says: "We *sold* one-half interest in Tasmania last week for 8000 sheep and 500 pounds . . . ." He also relies on Ables' letter to McStocker (Ex. D), which says: "The *sale* of Tasmania was for nine-twentieths of the Territory. We *get* this amount of money and about 6000 sheep . . . of uncertain value." See also Magoon's letter to Dexter (Ex. 8, Transcript Page 203), where he says: "They have sold territory, as I understand and *taken in payment* sheep and lands, which they had no right to do."

MOORE'S VISIT TO HONOLULU: There is not a scintilla of evidence that Moore told the partners in Honolulu of the Harrison agreement and the undisputed evidence is that he did not, so far as the witnesses knew (Transcript Pages 85-86). Magoon's letters to Dexter show that he would absolutely have

repudiated any such agreement. Plaintiff's claim that they knew of the details of the agreement is an assumption pure and simple.

THE DIVIDEND OF 18%. Plaintiff claims that the trial balance from which this dividend was made up showed that part of it came from the Harrison agreement. This is clearly not so and no fact in the record bears it out.

THE VALUE OF THE SHEEP AND THEIR SUBSEQUENT SALE FOR 500 POUNDS: We do not admit plaintiff's contentions as regards these matters, but do not go into them because we believe them to be immaterial.

THE START FOR TASMANIA: Plaintiff expressly says that he started for Tasmania on October 4th, 1906. We shall show the importance of this admission later. Of course plaintiff's statement that the defendants promised to return the sheep is incorrect, if it refers to all of the defendants.

Apart from the above criticisms we do not care to further discuss the facts except in argument.

THE PLEADINGS.

In regard to these we simply wish to say that as our Supreme Court in 13 Haw. 361 overruled plaintiff's exceptions to the sustaining of the demurrer to the Complaint, remarks as to *some* of the grounds of demurrer not being tenable would be obiter dicta and not "the law of the case."

THE TRIALS.

One of plaintiff's statements in regard to these will bear correction. He says that the Supreme Court overlooked the fact that the New Zealand Summons was served on Ables as soon as he could be found. This was not so. The demand relied on and alleged in the Complaint was that of March 10th 1898 on Cowart and Kirkpatrick. It was only at the last trial that plaintiff veered round and relied on the New Zealand Summons as a demand.

ARGUMENT.

THE QUESTIONS AS TO THE AUTHORITY OF KIRKPATRICK, COWART AND ABLES TO SIGN THE HARRISON AGREEMENT ON BEHALF OF MAGOON, EMERSON AND McSTOCKER AND AS TO THE RATIFICATION OF THE AGREEMENT BY SAID MAGOON, EMERSON AND McSTOCKER.

The firm, to which the writer of this brief belongs, put in an elaborate brief on the question of the authority to execute the agreement when the case came before the Supreme Court of Hawaii after the first trial (14 Haw. 418), and another almost as elaborate on the subject of ratification after the second trial. (16 Haw. 332). Both contentions were sustained by our Supreme Court.

Harrison vs. Magoon 14 Haw. at Pages 421-424
Harrison vs. Magoon 16 Haw. at Pages 335-337.

The firm does not now represent any one except the defendant Ables in this Court, the other defendants being represented by Mr. Magoon. Although, to relieve Ables, it is perhaps necessary to establish that Magoon, McStocker and Emerson are not bound by the agreement, the burden of sustaining these contentions rests mainly on them and we look to them to show, as they doubtless will, that the agreement was executed without authority and was not ratified by them. We shall therefore pass over the points in question and come directly to the defences of the defendant Ables, assuming that the non liability of Magoon, McStocker and Emerson is established. We would remark, however, that many of the facts previously corrected bear on these points alone.

THE DEFENDANT ABLES CANNOT BE HELD INDIVIDUALLY ON THE HARRISON AGREEMENT.

We prefer, owing to lack of time given to answer plaintiff's brief, not to discuss the points in question in the same order which he has, but instead we shall first advance the points as to the non liability of Ables exactly as we advanced them in the Supreme Court of Hawaii with a few minor changes so as to make those arguments clearer to this Court. We shall

then take up certain additional grounds and make such further observations as plaintiff's brief seems to require.

1.

THERE WAS AN INSUFFICIENT NOTICE OF DISSATISFACTION TO AND AN INSUFFICIENT DEMAND ON ABLES.

Harrison in his complaint alleges that he gave notice of his dissatisfaction to *the defendants* and made a demand on them to deliver the stock called for by the agreement on March 10th 1898. This notice was shown to have been given to Kirkpatrick and Wolfenden alone and the demand was made on them alone (Tr. p. 107). No notice by way of letter or otherwise was given the other defendants, certainly not to Ables until the New Zealand Summons was served on them on July 23rd 1898 by Mr. E. A. Mott-Smith (Tr. p. 147), said Summons having apparently been taken out on April 18th 1898 (See Summons, Ex. M.).

The very point now in question came up at a former trial, where, after the judgment had been reversed, plaintiff moved for a rehearing as to Ables' liability on the ground that as he personally signed the Harrison agreement, he could be held apart from the other defendants.

On this point the court said:

> "The point mentioned in the present motion, while not expressly referred to, was disposed of by the decision. It was not overlooked. The action was brought against nine persons. The notice and demand relied upon was shown to have been made upon Kirkpatrick alone or, perhaps, upon Cowart and Kirkpatrick; in any event, no notice or demand was shown to have been made upon any of the other defendants. The notice to Kirkpatrick could affect the other defendants only upon the theory of a joint liability. If all of the nine are jointly liable,—and upon the present state of the case it may yet be proved that they are—recovery cannot be had against three or four only of the joint contractors. With possible exceptions not material in this case, the recovery must be either against all who are jointly liable or against each of the persons separately upon his several liability and in the latter case notice

to one would not, by mere operation of law, be notice to any of the others."

See 14 Haw. 532.

That is, the court particularly held that the demand on Kirkpatrick on March 10th 1898 could affect the other defendants only on the theory of a joint liability and that the recovery would have to be either against all jointly or against each one separately on his several liability, in which latter case a several notice to and demand on each would be required. The court naturally assumes that the notice and demand in question in this suit is the notice and demand of March 10th 1898. No other was suggested till the motion for a nonsuit was made at the last trial. The court seems to intimate that the question is open whether less than all of those whose names are attached to the agreement can be still held *jointly*. This intimation seems wholly at variance with the language of the court just quoted and will be considered under another head. We will at present assume that, as Magoon, McStocker and Emerson (as well as Powter, concerning whom *no evidence whatever* of ratification was given) cannot be held, Ables can only be held on his several liability, thus necessitating a several notice to and demand on him.

It is very obvious that the notice to Kirkpatrick was not notice to Ables and plaintiff at the last trial was forced to rely on his New Zealand Summons to help him out of his difficulty. This summons was received by the defendant Ables more than six months after Harrison started for Tasmania. Harrison claims that he started for Tasmania on Jan. 17th 1898, in which case the Summons was issued less than six months before his time was up, though not served till after it was up. The evidence, however, seems clear that he started October 4th 1897, immediately after the execution of the agreement (See Plff's brief p. 8) and if this be so, his notice was not even issued or mailed within the necessary six months. Under either theory we contend that the notice claimed, assuming it can be relied on, was too late, but the facts are undisputed and we contend they absolutely establish that Harrison started for Tasmania on October 4th 1897, under the terms of the contract. Furthermore the allegations in the New Zealand Summons were that plaintiff *had* given notice of dissatisfaction to and made demand

on the defendants on March 10th 1898. There was no statement that he actually was dissatisfied.

Plaintiff never intended his New Zealand suit to be a notice and demand and cites no applicable authorities to show that it was, even if the court should hold that it was in time. We contend that it clearly was not the notice and demand required under the contract. It merely showed, if anything, that plaintiff *had* given notice and made a demand, and as Ables had never received any such notice or demand he had a right to rely on the fact that Harrison had *not* notified him and may now claim that he is not *severally* liable. Harrison did enough in the way of notice and demand to hold Ables jointly, if he can be so held, but he did not do enough to hold him *severally*. This distinction is important and should be borne in mind.

In view of the foregoing it seems hardly necessary to discuss most of plaintiff's cases on this subject. They do not bear on this case at all if the New Zealand suit was not a several notice and demand.

The question of reasonable diligence which some of them raise may be slightly in point, but plaintiff's diligence is a rather minor issue in this case. The plaintiff never intended the New Zealand Summons to operate as a notice and demand and hence his diligence in getting it out is wholly immaterial.

Another and to our minds a conclusive reason why plaintiff cannot claim that the Summons was a notice and demand is that the notice and demand alleged in this case were alleged to have been given or made on or about March 10th 1898, the date of the demand on Kirkpatrick. Plaintiff has plainly proceeded on the theory of a joint obligation in relying on this demand and should not be at this date allowed to set up a totally different notice and demand for the purpose of holding Ables *severally* liable.

While it may not be necessary to allege in a declaration the exact time that notice was given and demand was made, we submit that where these things must be alleged they must be reasonably certain.

See 4 Encyc. Pl. & Pr. 646, 653, 654.

And if the complaint contains the proper allegations of demand and notice, a nonsuit will be granted where the proof fails to support them.

Id. 663.

If plaintiff had set out in his Complaint that notice was not given till more than six months after he started for Tasmania as he would have had to do in relying on the New Zealand Summons he would have been bound to show an excuse for his delay.

14 Encyc. Pl. & Pr. 1070.

The citation from page 1071 of the same authority found in defendant's brief is shown by the context to be opposed to the general rule.

These general principles go clearly to show that plaintiff must allege at least due notice and demand as he has done, and if he alleges something less than due notice and demand he must excuse himself in some way. The necessary inference is that he cannot allege one notice and demand and then rely on another, or allege a notice and demand which is due and proper and then rely on a notice and demand which needs an excuse. And this is especially true where, as here, *one* notice and demand is alleged against all the defendants and is founded on the theory of a *joint* liability. Under such an allegation it seems to us clear that plaintiff cannot show separate notices and demands on *different dates* to lay a foundation for a several liability.

See on this point

22 Encyc. Pl. & Pr. 527, 608 and cases cited
Eastman vs. Bodfish, Fed. Case 4255,
Kellogg vs. Denslow, 14 Conn. 411. 425,
Gulick vs. Loder, 14 N. J. L. 572.

There is no need to multiply authorities on the subject of variance, for it seems to us that the variance here is so wide and its results are so far reaching that it cannot well be held not to be fatal. As we have said, one demand on a day certain is changed to several demands on different days and a joint liability is thereby changed to a several one.

We contend therefore (a) that the summons is no sufficient notice and demand and (b) that even if it is it cannot be relied on in this case.

The necessity of proving notice and demand is practically conceded by plaintiff and would be clearly necessary under the decision on the motion for a rehearing at the first trial (14 Haw. 532).

If the court should hold that Magoon, McStocker and Emerson have ratified the Harrison agreement, then these principles would also apply in their cases. We call attention in this connection to the fact that there is no evidence that one of the partners, A. E. Powter, ever ratified the agreement. His name was signed by an attorney as were those of Magoon, McStocker and Emerson, and we contend that a failure to connect him with the transaction renders the liability of Magoon, McStocker and Emerson several, if anything, and makes necessary a several demand in their case as well as in that of Ables.

2.

THE NEW ZEALAND JUDGMENT IS A BAR TO THIS ACTION AGAINST ABLES. THIS GROUND APPLIES EQUALLY TO THE CASES OF THE DEFENDANTS MAGOON, McSTOCKER AND EMERSON.

It appears that plaintiff started suit in New Zealand against all of the defendants here sued about April 1898 (See Ex. M) and judgment was recovered against all the defendants except Wolfenden and Powter (Ex. V), Kirkpatrick, Cowart and Wolfenden having been in New Zealand when the suit was brought. We do not see why this judgment does not merge the claims under the contract and bar this action. It is admitted on all sides that plaintiff sought some satisfaction under his agreement in that suit and how can he now come in and sue again, even if we assume that the judgment was only effectual against Cowart and Kirkpatrick?

As regards any *joint* liability the judgment would seem to be plainly a bar by all the authorities.

9 Cyc. of Law & Procedure 654,
1 Daniel on Negotiable Instruments, S. 1296,
Mason vs. Eldred, 6 Wall 231,
Holman vs. Longtree, 40 Ind. 349.

On the question whether a judgment is a bar where the contract is joint and several and there is no satisfaction obtained the authorities are in conflict. Several hold that a party may pursue his remedy against each of the several obligors till he gets satisfaction. We take it, however, that this is not sound law and the point is well illustrated by a decision of the Supreme Court of the United States.

U. S. vs. Price 9 How. 83, 93.

There Judge Grier says:

"But these cases (referring to previous citations) give no countenance to the assertion 'that a joint judgment is not *per se* a satisfaction of a joint and several bond. The law on this subject is too well settled to admit of a doubt, or require the citation of authorities, that, if two or more are bound jointly and severally, the obligee may elect to sue them jointly or severally. But having once made his election and obtained a joint judgment, his bond is merged in the judgment, *quia transit in rem judicatam.* It is essential to the idea of election that a party cannot have both. One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond. It no longer exists as a security, being superseded, merged, and extinguished in the judgment, which is a security of a higher nature. The creditor has no longer a remedy, either at law or in equity, on his bond, but only on his judgment . . . . . "

We contend under this case that the judgment clearly bars the present action. Plaintiff elected to sue in New Zealand, knowing that the four Honolulu defendants were not there and we claim that he is bound by his election. The fact that judgment was not entered against Powter and Wolfenden was presumably because plaintiff failed to prove his case against them and cannot affect the matter one way or the other. He certainly cannot again sue Cowart, Kirkpatrick and Wolfenden and get judgment. Nor can he sue the other defendants jointly because of this fact and because of the fact that he has taken a joint judgment. As to suing them severally, he has already prosecuted an action on the contract to judgment and his contract is thus merged in the judgment. He has elected his remedy and is bound by his election.

Defendants make a further contention on these points. Section 1741 of the Revised Laws of Hawaii requires the joinder of the defendants now being sued. But as there has been a valid judgment against Cowart and Kirkpatrick at least and a valid dismissal as to Wolfenden at least, he cannot now sue those three parties again and hence can sue none of the defendants. Even if we assume that the decision of the United States

Supreme Court heretofore cited is erroneous as a common law doctrine, the terms of our statute make the same result necessary, for plaintiff must sue all under our statute and has estopped himself from so doing by his own acts.

The intimation by the Supreme Court of Hawaii that there would be no merger of the contract in the judgment if the judgment were void (13 Haw. 359) cannot apply in this case. The judgment against the Honolulu defendants may be void, but it cannot be void against Cowart and Kirkpatrick who were residents there.

See *Gilman vs. Rives,* 10 Peters 298, 300.

The judgment being valid against Cowart and Kirkpatrick, our statute prevents this suit. Suppose, for instance, that a valid judgment, instead of having been rendered against Cowart and Kirkpatrick alone, had been rendered against all the defendants except Mr. Magoon. Could plaintiff possibly contend that he could proceed against all the defendants here for the mere purpose of holding Mr. Magoon? We submit not and the present case is the same on principle. The plaintiff could have proceeded in New Zealand only against those resident there had he so desired (see *Gilman vs. Rives* supra) and a void judgment there against the Honolulu defendants would amount to nothing more than a non joinder in effect. It could not release Cowart and Kirkpatrick.

The fact that the judgment is a foreign one can also make no difference.

See *Harrison vs. Magoon* 13 Haw. at Page359.

We submit this point as decisive of the case, although it is in no way referred to in plaintiff's brief.

3.

ABLES CANNOT BE HELD LIABLE ON THE CONTRACT, IT BEING IMPOSSIBLE TO HOLD MAGOON, EMERSON AND McSTOCKER, AND CERTAIN OTHER DEFENDANTS.

This is the ground on which Judge Robinson, the trial Judge, granted the non-suit as to Ables and deserves very full consid-

eration. The contract was signed by Cowart, Kirkpatrick, Wolfenden and Ables personally. Just how the contract was signed for the others appears in 13 Haw. 344. The signatures in each case were "A by his attorney B." Magoon, Emerson, McStocker and Powter not being liable can Ables be held on the contract? (The question of what other remedy plaintiff might have need not be considered except incidentally.)

One of plaintiff's contentions in this regard is that Ables may be held as an *agent*. As the only agency Ables assumed was to act for McStocker, the question is whether the signature "Frank B. McStocker per his Atty. L. C. Ables" binds Ables *on the contract* in place of McStocker. It seems to us clear that it does not.

There is no doubt that a signature such as "A agent for B" and even perhaps "A for B" would bind A individually on the contract. But a contract signed "A by his agent B" is the contract of A or of no one at all. It does not purport nor is it intended to bind B.

Certain cases cited by plaintiff clearly bring out this distinction. In *Bell vs. Teague* (3 So. 861) defendant contracted in his own name (see p. 863). This also was the case in *Hull vs. Brown* (35 Wis. 659) (see pp. 657, 659). So also in *Hastings vs. Lowering* (3 Pick. 214) the agent endorsed without qualifying his signature.

The citation quoted by plaintiff from

1 Encyc. Law 1127, 1128

correctly states the law by pointing out that there is a small class of cases where the agent is held liable, but that by the weight of authority the agent is not liable when signing his principal's name as agent for the reason that in making the contract he in no way attempted to bind himself.

See also cases cited in 1 Encyc. Law 1128 note 2
Abbey vs. Chase 6 Cush. 54, 56,
Hall vs. Crandall 29 Cal. 568.

To hold the agent in such cases is to make a new contract for the parties and violate the fundamental doctrines of the law of agency.

The correct remedy is well pointed out as follows:

> "As a person entering into a contract as agent for another warrants his authority . . . . . it may be stated generally that the remedy against one who assumes to act as agent for another, and in that capacity undertakes to make a contract binding upon his principal, is in the nature of an action for deceit, or upon the breach of his implied warranty of his authority, according to the facts of the case."

1 Encyc. Law 1127.

In this case, however, there is no liability in Ables as agent irrespective of the foregoing principles. Harrison admittedly knew all the facts as regards Ables' authority and merely made a mistake of law.

See 14 Haw. 422.

As to this, the law is as follows:

> "To give a party a right of action against a professed agent, he must have been ignorant of the want of authority on the part of the latter and have exacted upon the faith of the representations, express or implied, that the professed agent had the authority assumed. Hence, if the party complaining is fully cognizant, of all the facts touching the agent's authority, the latter will not be liable."
>
> "Where all the facts are known to both parties and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be bound is no ground for charging the agent."

1 Encyc. Law 1127.

Hence we contend that Ables cannot be held in this action *on the contract* on any ground of agency.

Plaintiff's partnership cases also do not touch the proposition in this case. It is not a case of one partner signing the firm name but of certain of the partners signing themselves individually and *as agents* for others. For instance in signing McStocker's name Ables did not sign as McStocker's partner but as his attorney or agent and so expressed himself in clear terms.

There is no question of partnership involved in such a transaction and it was an entirely incidental and immaterial fact that Ables happened to be McStocker's partner as well as his agent.

There are many cases cited by plaintiff under this head and we have examined them carefully. Many are not in point and those which are merely establish the rule as laid down by Bates that a partner signing the firm name is himself bound. This rule is one of the many peculiar features of the law of partnership and we do not desire to dispute it, but it has no real bearing on the case at bar. We have here a case of certain partners signing for other members of the firm *not as partners,* but as private agents and under purely individual powers of attorney. This distinction is all important and when once it is fairly grasped it cannot fail to be convincing. It is true that Ables was in fact a partner with McStocker, but he signed as his private agent and not as his partner or by virtue of his partnership authority. If one, John Smith, had been McStocker's agent he would not be bound if he signed for McStocker, and Ables, with his power of attorney to act for McStocker, as far as McStocker was concerned, and not for the partnership, stands on the same footing as John Smith.

What to our mind is the really vital point in this connection and by which the lower court was principally troubled is the one to which plaintiff devotes very little space in his brief i. e. whether as one of several joint *and several* obligors Ables can be bound although several of the others who were to sign the contract with him never did so and never became liable thereunder. This presents a very difficult question on which the authorities are not altogether in harmony.

It is to be noted at the outset that all of plaintiff's cases are cases of joint and several *bonds.* Not a single case of a contract is cited and such cases will be found extremely difficult to find.

The bond cases are naturally more numerous than others and we shall deal first with that class of cases. It is not disputed that plaintiff's cases lay down the rule contended for as to bonds nor is it disputed that there are others to the same effect. The authorities are very evenly divided and all that we can do is to cite cases opposed to those cited by plaintiff and endeavor to point out that they rest on sounder principles.

Plaintiff cites a case from 10 Mass. 442. In this connection we desire to refer the court to two later Massachusetts cases which seem to either distinguish or overrule it.

Bean vs. Parker 17 Mass. 591,

was the case of a bail bond where the principal did not sign. The court says on Page 604:

> "Now, a bond or other instrument, intended to be executed by several is not good against one alone; and a declaration which should set forth a bond purporting to be made by A as principal and by B and C as his sureties, would not be supported by producing in evidence a bond made by his sureties alone."

And a later Massschusetts case points out that the controlling feature in this class of cases is whether it is intended that all the parties should execute it and whether the parties held liable would have a remedy *for a contribution* against those who are expected to but do not execute the bond.

Mattoon vs. Barnes 117 Mass. 463, 466.

Ables would of course have no right of contribution here against Magoon, Emerson and McStocker.

In speaking of a joint and several bond not signed by the principal the Supreme Court of Minnesota says:

> "*Prima facie,* the instrument now being considered was incomplete and invalid and was not binding upon those who signed it as sureties. Nor can we see that a distinction can be drawn between bonds which are simply joint and those which are joint and several, as was that in controversy."

Martin vs. Hornsby 55 Minn. 187, 190.

See also

Hall vs. Parker 39 Mich. 287, 288,
Bunn vs. Jetmore 70 Mo. 288,
State vs. Austin 35 Minn. 51.

All the cases admit that a party signing a joint and several bond is not liable, if, when he signs, he makes the condition that others are to sign too. The main question is whether this

condition is not to be presumed till the contrary is shown. We call attention in this connection to the case of

Johnson vs. Township 39 Mich. 187, 188,

where Campbell J. says:

> "We are quite aware that there is a conflict in the cases on this subject as to the presumption of consent and the burden of proof . . . In *Wells vs. Dill,* 1 Mart. (La.) (N. S.), 592, the doctrine was thus laid down: 'The contract is incomplete until all the parties contemplated to join in its execution affix their names to it; and while in this state cannot be enforced against any of them. The law presumes that the party signing did so, upon the condition that the other obligors named in the instrument should also sign it; and their failure to comply with their agreement gives him the right to retract . . . . ' In our opinion this doctrine is the safest and most in accordance with principle."
>
> "Where several names are written as co-obligors and one of them is called upon to sign it, he does so upon an implied understanding that he can in case of being held responsible, not only have his right to contribution, but a further right to have it capable of proof and enforcement according to the terms of the contract as it purports to be drawn up . . . . . "
>
> "The present case is within the principle of those cases which throw the burden of proof on the sureties to establish their non consent, for here that non consent was made out. But we are not disposed to follow that rule, which seems to us in violation of the fundamental principles of suretyship, and essentially unjust."

Another case which is very much in point here is:

Pepper vs. State 22 Ind. 399.

The head note reads:

> "Where an official bond is drawn up and certain names are inserted in the body of it as obligors, and a part only of such names are actually signed to it, the obligation will not become binding upon them until it is executed by all, on the ground that the presentation of such bond, so pre-

pared, to such persons (named in it) as signed it, amounted to a representation that all the persons named in it would sign it before its delivery."

"Where such a bond is presented to such a person for his signature, by the principal in the bond, and such person signs it, there being several signatures attached to it already, and it afterwards appears, from some cause, that the bond is not binding on some or any of the persons whose names preceded his, it should be held not binding upon him, unless it be shown that he had knowledge of its invalidity as to the others at the time he signed it."

See opinion pp. 417, 418 for elaboration of these principles.

We strongly contend that these cases cited by us represent better law than plaintiff's cases and that their effect is to establish the non liability of Ables on the Harrison agreement.

We have already noted that the cases which plaintiff has cited are *bond* cases and he has not referred us to any cases of contracts. Certainly the general rule as to contracts is that they must be executed by all the parties named in them before they will be binding on any.

See 9 Cyc. of Law and Procedure 299 and cases there cited.

In

Arnold vs. Scharbauer 116 Fed. 492,

a contract was made by A with B and C, A was under entirely separate liability to each, yet as C did not sign the contract it was held unenforceable by B.

The court says on page 495: (We use the terms A, B and C to denote the parties)

"By the express terms of the contract the obligation to put stock on the market after the creation of the corporation and to expose and sell it, is imposed upon C as much as it is on B. It is a reasonable inference that in agreeing to organize the corporation at their expense and trouble and investing it with the title to their 500 acres of land, the inducement of the defendants (A) thereto was that they should have the right to the services, influence and responsibility of C as much so as of B. In other words they were to have the personal responsibility of either; so

that in case of default on the part of the parties of the second part they could look for indemnity to both B and C. In short the defendants never came to a compact alone with B in the proposed enterprise."

See also

Wells vs. Dill (La.) cited in
Johnson vs. Township 39 Mich. 187, 189.

We shall not multiply authorities on this subject as our brief is perhaps too long already. We contend, however, that where a contract is drawn up to be executed by several and some do not execute it, the only just and sound rule is that the parties executing the contract are not liable in the absence of evidence that such parties intended to bind themselves despite non execution by the others. This rule may not always work justice but it will do so more frequently than the harsh rule contended for by plaintiff. We contend that in this case there was no mutuality of contract. The minds of the parties never met except on the theory that all the defendants should be bound.

The idea of holding Ables individually liable on the contract now in question is essentially unjust. Harrison himself drew up the agreement and procured its execution. (T. pp. 113, 123) The body of the agreement reads that it is an agreement between Magoon, McStocker, Emerson, Powter, Ables and others and Harrison and Gilmore. The agreement was not signed by Magoon, McStocker, Emerson or Powter except by agents who had no authority to sign for them. It was not signed by Moore at all though it purported to bind him. Harrison had full knowledge of the partnership articles and of the contents of the various powers of attorney. The consideration purporting to pass to Harrison was his being taken into the Hagey partnership, yet he could not be so taken in without the consent of *all* of the partners.

Harrison vs. Magoon 14 Haw. 418, 419, 422.

Harrison therefore never became a partner in the Hagey business and the mere fact that he transferred his sheep and sheep run to the partnership could not bind the partners. To hold Ables on such a contract is unfair. Ables was a layman with no knowledge of law and, as he himself naively says, he did not care what the sheep were worth but was willing to put

in any value suggested by Harrison (T. p. 81). Harrison on the other hand was a lawyer capable of drawing up a pretty stiff joint *and several* contract. To say that Ables meant to be liable individually for $10,000 despite the fact that Magoon, Emerson, McStocker and Powter could not be held requires, to say the least, a wide field of imagination. He thought that Magoon and the others could be held and acted on that belief. He undoubtedly relied on them to contribute their share of any loss which should follow.

We do not say that plaintiff might not have shown that Ables intended to be bound whether Magoon and the others were bound or not, but we cannot impute such folly to him from the mere contract. We think the just and sound rule is that each person named in the contract signs it on the implied understanding that all parties named therein will sign it and will be bound by it and that the cases to the contrary are, to use the language of Judge Campbell of Michigan, "essentially unjust." This is undoubtedly the rule as to joint contracts and why should there be any distinction made as to a joint and several contract?

See *Martin vs. Hornsby* supra.

It is true that in a joint and several contract a party undertakes an individual obligation as well as a joint one, but he relies on his right to a contribution from his co-obligors and if he is deprived of this he is forced into a contract which he had no intention of making and which is infinitely more burdensome than the contract which he did make.

There may be a great hardship on Harrison in this case, but it in no way approaches the hardship on Ables, who is now sought to be charged with a penalty of $10,000, which he never for a moment would have thought of incurring.

It was intimated by the Supreme Court of Hawaii that the question is open whether the parties who actually signed the agreement can be held jointly liable (14 Haw. 532) and now is a good time to consider this question. We submit in the first place that such was not intended to be the nature of the agreement and the cases above cited are fully applicable. In addition to this, however, the transaction, as Harrison well knew, could only be consummated by all the partners. This is a good ground for not holding Ables as well as a good ground to show that there was not a joint obligation merely on the part of those

who signed. Furthermore the obligation would have to be held joint on the part of those who signed *and ratified* and not merely on the part of those who signed if the theory is applicable at all. *Who* are the parties? All the joint obligors must be held on a joint liability or *none* can. Is Moore also to be held? Is Powter to be held? There is no evidence whatever as to Powter. His power of attorney may have been broader than the rest or he may have made a full and complete ratification. If he is a joint obligor he must be held, yet it is impossible to discover whether he is a joint obligor and hence he cannot be. We submit that the very nature of the agreement makes the joint liability in question impossible and also that the circumstances prevent such a holding. We have felt it wise to touch on this point, but have done so briefly, for the reason that it is not apparently relied on in any way by the plaintiff, except of course in his general reliance on any ground on which the court will give him judgment. Another point as to the joint liability theory is that the New Zealand judgment bars a joint liability.

See cases cited under that head.

It may here be mentioned that the grounds for not holding Ables cited under the cases heretofore cited would seem to apply also to Magoon, Emerson and McStocker for the reason that Powter is not shown to be liable. If Magoon, Emerson and McStocker be held to have ratified the agreement such ratification, made at the distance it was, could only have been upon the theory that all the parties mentioned in the agreement were bound by it. And all this also goes to show the absurdity of saying that there was a ratification of the agreement to pay Harrison $10,000 in case of his dissatisfaction.

4.

THE NATURE OF THIS CASE PREVENTS THE ENTRY OF ANY JUDGMENT AGAINST ABLES, IN THAT THERE IS A MISJOINDER OF DEFENDANTS.

The contract in this case has been spoken of as a joint and several contract. Plaintiff sets out that it was executed by all the defendants who are sued yet it turns out that Magoon, McStocker, Emerson and Powter did not execute it and that Moore did not sign it. The evidence thus discloses that there

is a clear misjoinder of parties defendant and hence we contend a several judgment cannot be rendered against Ables.

> "In actions ex contractu against several, if a joint contract be not proved against all the defendants except where there is matter going to the personal discharge of some of them, the plaintiff must be non-suited on the trial."
>
> 15 Encyc. Pl. & Pr. 582, and see cases there cited.
>
> "The case is therefore a direct authority for this position that in a suit upon a joint contract against three, the plaintiff is not entitled to recover against either of those parties, without proving a joint contract as laid, *although he does prove a contract, upon which the party against whom he seeks to recover is liable.* It is now perfectly well established that a misjoinder of plaintiffs is a ground *of nonsuit, as is also a joinder of too many defendants* . . . Upon a review of all the cases, we think there is no one which throws any doubt upon the rule of practice, that in an action upon contract against two or more, the contract must be proved as laid, and that in a trial upon the general merits the plaintiff cannot have a judgment against one or more, where all are not liable."
>
> *Tuttle vs. Cooper* 10 Pick. 281, 283, 291.

See also

Patterson vs. Loughridge 42 N. J. L. 21, 22, 23,
Walcott vs. Canfield 3 Conn. 194, 198.

We cite these two cases as especially strong ones from the mass of cases set out in 15 Encyc. Pl. & Pr. 582 supra. The rule is universal and we rely strongly on it in this case. There being a plain misjoinder of parties defendant a nonsuit is the only possible result.

Our statute (Revised Laws Sec. 1741) can make no possible difference in the case. Plaintiff has sued four defendants at least not shown to be liable. Hence there is a misjoinder as to those four either under or apart from the statute.

We see no remedy for plaintiff, but if there were one, it would be by a discontinuance or severance as to the defendants not liable. Plaintiff did not take this course and was rightly nonsuited.

This ground is also urged in behalf of all the defendants as the defendant Powter was joined and not shown to be liable. There was a clear misjoinder of Powter.

Another ground for affirmance closely allied with the last one is that there is a clear variance between the contract sued on and that actually proved. The contract sued on is alleged to have been made by all the defendants, but four are shown not to be liable.

5.

THE CONTRACT WAS INCOMPLETE AND, ACCORDING TO THE DOCTRINES OF THE SUPREME COURT OF HAWAII, CANNOT BE ENFORCED AGAINST ABLES ALONE.

The arguments already advanced practically constitute our case as we presented it to the Supreme Court of Hawaii at the last hearing before that court. It seems to us that they substantially answer the arguments advanced in Plaintiff's brief from pp. 38 to 55. Numerous cases are cited which were not cited below, but we do not deem it necessary to go into them in detail and are willing to rest our reply to them on the foregoing argument. As to the *bar* of the New Zealand Judgment, that was fully argued below, yet plaintiff has in no way met it in this case. As a supplemental argument to the foregoing, we wish, however, to quote from the last decisions of our Supreme Court both on the merits and on the motion for a rehearing.

> "In considering the demurrer in the first action the court construed the agreement that 'the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated' as being in effect that 'the parties of the first part do hereby jointly and severally make with the parties of the second part the following agreement of partnership." 13 Haw. 360. It is contended on behalf of the defendant Ables that this was *obiter dictum* and the court is not precluded from now considering whether a several liability was created by the agreement. In passing upon the demurrer the court decided upon the effect of not joining all of the contractors, but unless the declaration alleged a joint liability it would have been unnecessary to join them if there was a several liabil-

ity. The declaration appears to have been framed upon the theory of joint liability of the defendants Magoon, McStocker, Ables and Emerson. If they were jointly liable the other parties to the agreement were so also, and perhaps it was unnecessary to pass upon the question of several liability. We consider the question open for re-consideration. The agreement purports to be 'made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members: T. E. Cowart, J. H. Kirkpatrick, and Geo. D. Moore, of the state of Texas, United States of America, A. E. Powter, on Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison, both of the city of Auckland in the colony of New Zealand, parties of the second part.' It is not clear in what sense the words 'individually' and 'collectively' are used. To hold that the members of the original partnership, in using the word 'individually,' intended that they should be severally bound if all were not would be going further than we think is authorized by the agreement. In denying the plaintiff's motion for a rehearing of the decision sustaining the demurrer the court said: 'Whether or not, if it shall appear hereafter that some of the persons named as defendants neither executed nor subsequently ratified the execution of the agreement, the others can still be held jointly liable, and . . . are questions which have not yet arisen and upon which no opinion is expressed." 14 Ib. 532. The court evidently had in mind the question whether the agreement would be complete unless all signed or ratified. Courts sometimes classify agreements between several persons as 'incomplete' if not signed by all who are named in them. This is on the theory of an implied term that all are severally bound in case only of all signing. In looking at the present agreement we reach the same conclusion by applying the theory of an implied term and by looking at the words used and the intended object. It is essential to a partnership agreement that each person mentioned as a partner severally agrees upon being so; and each of such persons can if he likes agree that the proposed partnership

shall do certain things, or that the old firm of which he is a member shall enter into the new partnership and then do certain things. We do not see any such undertaking in the language used in this agreement. 'In order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of severalty contained in it." 2 Chit. Cont., 11 Am. Ed., 1354. An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any one of them unless all execute or subsequently ratify the agreement. The thing to be agreed upon was that all the parties named and not certain of them should form a partnership. If no partnership was formed then there were no partnership rights or duties created by the incomplete agreement. The agreement which purported to be made between the Hagey Co., composed of Cowart, Kirkpatrick, Moore, Powter, Magoon, McStocker, Ables and Lamb of the first part and Gilmore and Harrison of the second part, was that the Hagey Co. collectively and its members individually 'do hereby constitute and accept the said parties of the second part as partners as hereinafter stated." The partners who signed did not severally agree that they severally would form a partnership with Gilmore and Harrison but that all of the partners did so. The agreement was ineffective for the purpose of forming a new partnership in consequence of the failure of certain of the Hagey Co. partners to execute it, and therefore Gilmore and Harrison were not constituted or accepted as partners and acquired no partnership rights. The views above expressed render discussion of the other exceptions unnecessary."

16 Haw. pp. 337-340.

"This is a petition for a rehearing of the case reported ante, p. 332. It is based upon two grounds. The first is that at the original hearing the plaintiff, who is the petitioner, relied upon the ruling made in this case in 13 Haw. 360, that the contract sued on was joint and

several, and some of those purporting against such of them as had undertaken without due authority to bind all jointly, whereas the court, as it is contended, reconsidered the former ruling and held that the contract was joint and not joint and several, and overlooked the argument that even though it was joint a recovery could be had against some of the parties thereto if not against all. This ground is based upon a misapprehension of the view that the court took in its recent decision and which is set forth, clearly as it seems to us, on pages 338 and 339, ante. That decision was based on the ground that the contract sued upon was incomplete, whether it was joint and several or only joint in form. Among other things the court said, on page 339: 'An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any of them unless all execute or subsequently ratify the agreement.' It was also pointed out in that decision that the court, as it was constituted when the ruling was made that the contract was joint and several, considered it still an open question whether the contract was complete or not."

13 Haw. p. 486.

6.

RE PLAINTIFF'S CONTENTIONS AS TO THE "LAW OF THE CASE" (BRIEF pp. 30-31, 59-65).

The "law of the case," which plaintiff contends was settled by the ruling of the Supreme Court of Hawaii on the defendants' demurrer (13 Haw. 360), is claimed to be that the agreement sued on was "joint and several." Several arguments may be advanced which fully meet this contention and it is unnecessary to cite authorities to uphold them.

In the first place, the holding (if there was any such holding) was a mere dictum. When plaintiff's Complaint was filed, the defendants demurred thereto and the demurrer was sustained. Plaintiff then took a bill of exceptions to the Supreme Court of Hawaii, which held that the demurrer was *properly* sustained and *overruled* the exceptions. Any remarks outside of this were clearly obiter dicta and not the final "law of the case." It is not the case of a *reversal* of a judgment (as

in plaintiff's cases cited on pp. 61 and 62 of his brief), but of an *affirmance* of a judgment. Hence no question of the "law of the case" is here involved.

Secondly, suppose that our Supreme Court *did* hold as the "law of the case" on demurrer that the agreement sued on *was* "joint and several," still, if its final decision that it was not was *right, this Court* clearly would not set that decision aside in order that this apparently endless case might be tried again simply for the purpose of prolonging litigation and again bringing it to Washington for a correct decision. The decision of the Supreme Court of Hawaii might be the "law of the case" there, but it is certainly not the law of the case in the Supreme Court of the United States.

Thirdly, plaintiff's point as to the "law of the case" is fully and completely answered by the Supreme Court of Hawaii itself on the decision on the motion for a rehearing.

See 16 Haw. pp. 486-7.

7.

THE AGREEMENT WAS NOT JOINT AND SEVERAL IN ANY SENSE.

This point involves a pure question of the construction to be given to the agreement with Harrison, which should be carefully examined (See Exhibit C. Tr. pages 159-161). The agreement first recites that in consideration of certain following agreements "the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners, as hereinafter stated." The first clause following, relates to the capital of the partnership, the second acknowledges the receipt of 2250 pounds by the Company from Gilmore and Harrison, and the third provides that Gilmore and Harrison shall conduct the business of the partnership in Tasmania at a salary of 40 pounds per month each. The fourth clause, on which the plaintiff relies, provides that if within six months from the departure of Harrison for Tasmania, he is not satisfied with the conditions of the partnership business in Tasmania, *the Company* will give him stock of the market value equal to the amount paid by him, and the fifth clause provides for the interests which Gilmore and Harrison are to have in the part-

nership. The other two clauses need not be particularly cited.

Plaintiff's argument is that the clause which precedes the seventh subdivision makes each of the agreements in those subdivisions binding on the different partners collectively and on each one individually, and it was intimated that that was the proper construction in the decision in 13 Haw. at page 360. It seems to us, however, that such a construction is clearly improper. There is nothing to bear out the contention that each of the subdivisions was supposed to be prefaced by the first clause, and there is to positively oppose it, the fact already stated that it is specifically stated that it is the "Company" nad not the partners or the individual parties to the contract, that agrees to pay to the plaintiff of a certain amount of stock. It is true that Mr. Ables did accept the plaintiff as a partner on the conditions in question, but it is not true that Mr. Ables individually guaranteed to Harrison the sum of 2000 pounds, in case he was dissatisfied with the partnership business. No one looking at the agreement and the surrounding circumstances, including Ables' desire to get out of the partnership testified to by the plaintiff himself, could so believe.

See Tr. Page 99, where the following question and answer appear in Harrison's testimony:

Q. Do you know why the transfer of the sheep was made to Ables personally?

A. The explanation that Cowart and Kirkpatrick gave me was that Ables wanted to get out of the Company, and that he was willing to take this in part payment of his interest in the Company, that is for the purpose of buying him out, and that consequently it was to be transferred to him, and I was to get an interest in Tasmania, in lieu of the proportion of Mr. Ables' interest that I bought out.

Harrison further answered "I afterwards asked Mr. Ables if it were true, and he said he would rather ranch than stay in the Hagey business." Under all the circumstances, we cannot see how it can be claimed that Ables meant to bind himself individually or that he did bind himself individually to pay Harrison 2000 pounds. We think in the first place that the agreement cannot be read that way in any event, and in the second place it seems to us clear that the agreement construed in the light of the surrounding circumstances did not contemplate any such arrangement. The idea was that the

Company was to be bound to Harrison for this payment but not that each one of the individual partners was to be severally bound. We do not deem it necessary to cite authorities on this question, which is merely one of construction.

8.

PLAINTIFF'S PROPOSED AMENDMENT WAS RIGHTLY DISALLOWED.

On this point we are satisfied to quote from the decision of the Supreme Court of the Territory of Hawaii on the motion for a rehearing;

> "It is urged that this amendment may be allowed now by this court under the broad provision of the statute relating to amendments (Revised Laws, Sec. 1738) and under the view expressed in *Dowsett v. Jones,* 9 Haw. 543, and the cases there cited, to the effect that an amendment should be more freely allowed where, as in the present case, a new action would be barred by the statute of limitations.
>
> "We regret that we cannot take this view. It is true that the statute is broad and that it expressly permits amendments of certain kinds after as well as before judgment, but this does not mean that in addition to allowing an amendment the court may, as it would have to do in this case in order to make the amendment effective, reverse the judgment of nonsuit below and order a new trial when no error is found in the judgment below. If that judgment had been reversed and a new trial ordered, the court might also grant leave to amend before the new trial should be had. Likewise if the amendment were merely to conform the complaint to the proof, or otherwise was designed to support the judgment below, it might be allowed here, and of course, in such case, it would be effective without reversing the judgment below or ordering a new trial. The difficulty is that no error has been found in the judgment below, and in the absence of error that judgment cannot be reversed merely for the purpose of allowing an amendment and making it effective. This is the view generally taken elsewhere. For instance, in *Sutter v. San Francisco,* 26 Cal. 112, in which a similar proposition was made, the court said:

"The appeal is from the judgment, and we find no error to vitiate it. We hold that the court committed no error, so far as the record shows its action, and that the judgment is in all rsepects legal. We cannot, therefore, reverse it, for we find no error to justify such action, and plaintiff cannot now amend, because there is a valid final judgment; and there is nothing more to be done, without first reversing this judgment. It would be an anomaly in legal proceedings to hold the judgment in all respects correct, and then arbitrarily reverse it."

To the same effect, see *People v. Jackson,* 24 Cal. 630; *Gibbons v. Scott,* 15 Cal. 285; *Colorado Springs Co. v. Hopkins,* 5 Colo. 338; *Dennison v. Tyson,* 17 Vt. 549.

Most of the cases cited contra by the plaintiff are not in point. The case of *Balcom v. Woodruff,* 7 Barb. 13, however, is somewhat in point, for in that case the statute was almost identical with ours and the statute of limitations would have barred a new action, although other circumstances in the case were somewhat different from those in this case. The court there allowed an amendment *nunc pro tunc,* and then, without finding error in the judgment of nonsuit below, set aside that judgment and ordered a new trial in order to make the amendment of avail to the plaintiff. In support of this course the court cited an earlier case in the same jurisdiction (*Holmes v. Seely,* 17 Wend. 75), but said:

"This relief, however, is granted under the peculiar circumstances of this case, and the case is not to be made a precedent. The general rule is that a party who has not applied for an amendment until he has been nonsuited, is too late to ask for a new trial, in addition to an amendment."

In that case, it may be added, the plaintiff had moved in the lower court for leave to amend and for a new trial, as well as to set aside the judgment of nonsuit."

16 Haw. pp. 487 to 489.

9.

THE REFUSAL OF THE SUPREME COURT OF HAWAII TO HEAR THE EXCEPTIONS OTHER THAN THAT TO THE DISMISSAL OF THE MOTION FOR A NEW TRIAL WAS CORRECT, AND IN ANY EVENT SAID EXCEPTIONS ARE WHOLLY WITHOUT MERIT.

This point is well brought out by the decisions of this case in 16 Haw. pp. 179, 334, but we wish to add something thereto. The first question is whether any of plaintiff's exceptions except that as to the dismissal of plaintiff's motion for a new trial could be considered by our Supreme Court or even by the trial Judge under the general statement in the motion for a new trial that the court erred in admitting or excluding testimony (Tr. p. 207). The importance of this point is not great, because we shall show that the other exceptions are clearly untenable, but we wish to touch on it briefly.

We make the contention that in Hawaii motions for a new trial have been almost always made (except perhaps in the last year or two) solely on the ground that the verdict was contrary to the law and the evidence and the weight of the evidence. In any event we cannot at present recall a single case in Hawaii where a new trial was granted by the trial judge on any other grounds. Furthermore it has always been customary in bills of exceptions to specify particularly *by way of separate exceptions* every error relied on. As far as the Hawaiian practice goes, it makes strongly against the plaintiff and it will be a very trying day for court and counsel when plaintiff's contention is adopted and all concerned are left in blissful ignorance of the errors relied on until the appellant files his brief. Such a practice would be loose and unsatisfactory and does not merit this court's approval. And the practice of our Supreme Court has always been to require particularity in pleadings or papers where the case is brought before that court.

Fraga vs. Portuguese Ben. Soc. 10 Haw. 128
Kapuakela vs. Iaea 10 Haw. 97, 103
Serrao vs. Soares 11 Haw. 284, 285
Mist vs. Kapiolani Estate 13 Haw. 523, 526

See also

Territory vs. Watanabe 16 Haw. 196.

The reasoning of these cases would certainly seem to make their principles at least applicable to motions for new trial, for if every exception in the record may be brought up under the general grounds specified in the motion now in question the result which these cases attempt to avoid will inevitably be accomplished.

In

Mist vs. Kapiolani Estate supra it is said:

> "Counsel have no right to cast the burden on the court of searching through a voluminous record to find the ground of his objection and where the errors complained of are not squarely presented by the bill of exceptions, as in this exception, we shall follow the practice of this court and refuse to consider them."

And in

Fraga vs. Portuguese Benevolent Society supra

the following instructive rule is laid down:

> "An exception was taken to the decision and the findings of law and fact therein. Such an exception is too general and indefinite to be considered. The object of an exception as contemplated by the statute is to bring to this court a specific question of law upon which the trial Court has erroneously ruled to the prejudice of the party excepting, and not to enable the party to cast the entire case upon the court for review."

It is true that there is a conflict of authority in regard to the particularity needed in a motion for a new trial. We submit, however, that most of the states require more particularity than was used here and establish an infinitely sounder practice than the Western decisions on which plaintiff relies.

In

Barnard vs. Graham 14 Ind. 322

the statute expressly made "error of law occurring during the trial" a ground for a new trial, yet the court held such a statement too vague, saying:

"Numerous errors might occur on the trial and be excepted to; and the motion for a new trial ought to point out such as are relied on, so that the attention of the court would be directed to them. Otherwise it would be of little use to have written reasons filed at all . . . . . If the general language employed in this case be sufficient the Court would be required to review all its various rulings to which the party had taken exception, although the party called its attention to but one, or, indeed, to none of them, on the motion for a new trial."

See also

37 Am. Dig. New Trial S. 258

where it is laid down as the rule of numerous cases:

"To allege that court erred in receiving or rejecting evidence is not a sufficiently definite assignment of reasons for a new trial. The particular evidence with regard to which error is alleged should be pointed out."

See also

19 Pac. 46,
23 S. E. 119,
22 Conn. 326, 333,
34 N. C. 151,
23 Me. 556,
14 Encyc. Pl. & Pr. 890.

As to defendant's citations on these points it is wholly unnecessary to consider them in detail. Because the books on Practice say that errors occurring during the trial are ground for a new trial, it does not follow that a mere statement that such errors occurred is a sufficient pleading of the particular errors. And many of the authorities cited seem also to point to this conclusion. We are strongly inclined to believe that the great weight of authority requires far greater particularity than is used in this case, but, after all, the authorities are conflicting and it is largely a question of principle and convenience.

The next point to be considered is whether any of the plaintiff's first fifty-three (53) exceptions present any reversible

error, assuming that they can be considered. Plaintiff seems to rely on almost all of them and casts them all upon the court's mercy in the apparent hope that one at least among so many may be held well taken. It is to be remembered in this discussion that there is no question of misleading the jury, but merely a question of how far the errors affected the *nonsuit* which was granted. And if, despite any errors, the nonsuit was correctly granted on any ground which said errors did not affect, then it is clear that those errors are wholly immaterial on this appeal. We will now take up the various exceptions in their order:

EXCEPTION 1: A mere statement of opinion and no authority shown to bind Moore. And in any event we admit that there was probably sufficient evidence of Moore's ratification, so the alleged evidence is immaterial and cannot affect the nonsuit.

EXCEPTIONS 2, 3, 4 AND 5: The answers stricken out were all clearly irresponsive or hearsay and also are now immaterial for the reasons stated under Exception 1.

EXCEPTION 6: The question objected to in no way tended to bring out the knowledge of defendants of the Harrison agreement, which is the only claim now made by plaintiff in regard thereto. Furthermore it is clear from the evidence that no dividends were ever returned.

EXCEPTION 7: The objection in question was sustained after the answer had been given. Furthermore there was no question but that Ables knew of the contents of the agreement.

EXCEPTION 8: The question was clearly immaterial. What Ables did in regard to the New South Wales matter did not tend to show that *the other defendants* knew about the methods pursued.

EXCEPTION 9: The objection here can have no possible bearing on whether the nonsuit was rightly granted.

EXCEPTION 10: The objection here also cannot possibly affect the nonsuit. Further it was material to show the circumstances.

EXCEPTION 11: Again we are not told how this objection affects the nonsuit. It cannot affect it.

EXCEPTION 12: The question here asked merely followed up Ables' previous testimony as to a variance between the contract signed and the one produced. Moreover, for the purposes of the nonsuit, the contract produced must of course be accepted.

EXCEPTION 13: The letter from Ables to McStocker was

one of a chain, same being introduced by plaintiff. It also has no bearing on the question of a nonsuit.

EXCEPTIONS 14 AND 15: The same remarks apply to these exceptions as to Exception 13.

EXCEPTION 16: The trial balance was clearly admissable with the letter accompanying it.

EXCEPTION 17: We have here something which was a matter for direct but not for redirect examination.

EXCEPTIONS 18, 19, 20, 21, 23, 24, AND 25: The letters here offered were referred to in Plaintiff's Exhibit K, and were admissable to explain the statement there made in regard to them. Even if th letters be held to have been introduced at an improper time, there is clearly no reversible error.

Ahmi vs. Waller 15 Haw. 498, 501.

Moreover, while the letters tended to show that there was no ratification of the original unauthorized transaction by the defendant Magoon, plaintiff could not have been nonsuited if there was *any* substantial evidence of ratification and the question of the nonsuit is therefore unaffected.

EXCEPTION 26: This exception is clearly groundless, the question being wholly immaterial. It in no way tended to show any knowledge on the part of the witness.

EXCEPTIONS 27 AND 28: If Plaintiff put on any evidence of ratification, which we doubt, this evidence was clearly rebuttal to show that defendants did their best to repudiate the transaction in question. Also the question of nonsuit was unaffected bv it for the reasons pointed out under Exceptions 18-25.

EXCEPTION 29: The question here asked was an attempt to impeach plaintiff's own witness. Moreover, as it is clear that Moore *did* come to Honolulu and see the defendants, the question of nonsuit was wholl unaffected.

EXCEPTIONS 30-39: These exceptions do not deserve discussion nor do they seem much relied on by plaintiff. Furthermore Ables does not rely on the ground of nonsuit to the effect that there was no bona fide dissatisfaction on the part of the plaintiff. It is admitted for the sake of argument that this was a question for the jury, if plaintiff is not to be nonsuited on some other independent ground.

EXCEPTION 40: This exception is trivial. The answer was *not* responsive to the question and in any event all it brought out was brought out later.

EXCEPTION 41: The answer stricken out was clearly hearsay and in any event we make no point that no bona fide dissatisfaction was shown.

EXCEPTIONS 42-47: Most of the questions and answers in question called for or gave purely opinions and conclusions of the witness and the objections were all well taken. And we again call attention to the fact that we do not rely on the question of their being bona fide dissatisfaction shown. We expect to sustain the nonsuit on grounds wholly unconnected with this one.

EXCEPTIONS 48 AND 49: These questions were pure questions of law and in any event had and could have had no effect on the granting of the nonsuit.

EXCEPTION 50: The question here was immaterial and in any event was fully answered a moment or so later.

EXCEPTION 51: Harrison was not shown to be qualified to testify to the value of the sheep and sheep run. Their value was also wholly immaterial as regards the nonsuit.

EXCEPTION 53: Here again the testimony had no bearing on the propriety of granting a nonsuit.

We have carefully examined all of the above exceptions and are unable to perceive why any of them are before the court at this time. Most of the exceptions, when viewed in the light of the fact that a nonsuit was granted and the case never went to the jury, are wholly trivial. We think that this Court should express its disapproval of the practice inaugurated by plaintiff in this case. While it may be well to preserve all of one's exceptions and find out law by careful study which are material, it is unfair to both court and counsel to lavishly cast all upon the court with so poor a justification of them as is presented in plaintiff's brief. We submit that none of the exceptions in question are tenable.

And we further wish to point out that this Court will surely not reverse the decision of the Supreme Court of Hawaii for the reasons suggested, if the judgment of Nonsuit was in fact *correct*. To do so would merely be to prolong litigation.

10.

THE DECISION ON PLAINTIFF'S BILL OF EXCEPTIONS WAS NOT A "FINAL JUDGMENT" AND HENCE NO WRIT OF ERROR LIES.

As the decision of our Supreme Court in *Meheula vs. Pioneer Mill Co. Ltd.*, 17 Haw. 91, establishes that the Supreme Court of Hawaii has no power to enter up a final or any judgment on exceptions, we are of the opinion that the ruling on the exceptions *is* a final judgment to which a writ of error will lie. This court may, however, decide otherwise and we desire to raise the point for what it is worth.

> See Bierce vs. Hutchins (now before this Court on a similar question).

11.

THE ACT OF MARCH 3RD, 1905, ALLOWING APPEALS AND WRITS OF ERROR FROM THE SUPREME COURT OF HAWAII TO THE SUPREME COURT OF THE UNITED STATES DOES NOT APPLY TO CASES WHERE JUDGMENT WAS RENDERED BEFORE THE ACT TOOK EFFECT, AS IN THIS CASE.

The ruling on the exceptions in this case took place on December 19th, 1904, (Tr. p. 231), before the Act in question took effect. Whether such a prior judgment is reviewable will be decided in the case of *William Notley et al vs. Cecil Brown et al* now before this Court on motion to dismiss the Writ of Error. We submit the question now presented on the decision on that motion.

12.

THE FACT THAT THE MOTION FOR A REHEARING IN THIS CASE WAS NOT DECIDED TILL MARCH 6TH, 1905, GIVES THE PLAINTIFF NO RIGHT TO A WRIT OF ERROR WHICH HE DID NOT BEFORE POSSESS.

Plaintiff's exceptions in this case were overruled on December 19th 1904 (Tr. p. 231), his motion for a rehearing was filed January 24th 1905 (Tr. p. 261), argued February 20th 1905 (Tr. p. 261) and decided March 6th 1905 (Tr. p. 262). The Act of Congress allowing appeals was passed on March 3rd 1905. The decision on the motion was not the final judgment in the cause, and the fact of an appeal does not ever prevent a motion for a rehearing from being made.

See Taylor on U. S. Supreme Court p. 179 and cases there cited.

Even if we assume that the decision on the motion for a rehearing might be the subject of appeal, it certainly cannot be used to bring up an entire record, where no such right would otherwise exist. Lack of time prevents a complete treatment of this point, as well as several others.

13.

Several other points are presented in Mr. Magoon's brief better than we could present them and we shall not repeat them here. We rely, however, on those points as well as on the ones here presented.

In conclusion we have only to add that until lately we had thought this case would not come up till March, we have only recently received plaintiff's brief, and amidst the stress of other duties we have not been able to prepare as careful or elaborate an argument as we should have liked to have done. We submit that plaintiff has failed to show cause for a reversal of the judgment of the lower court and a new trial.

Dated, Honolulu, December 8th, 1906.

E. B. McCLANAHAN,,
Attorney for Defendant in Error, L. C. Ables,
S. H. DERBY,
Of Counsel.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906

No. 107

Office Supreme Court,
FILED.
JAN 4 1907
JAMES H. McKENN

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

BRIEF OF THE DEFENDANTS J. A. MAGOON, F. B. McSTOCKER AND DOROTHEA EMERSON, NEE LAMB.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

BRIEF OF THE DEFENDANTS J. A. MAGOON, F. B. McSTOCKER AND DOROTHEA EMERSON, NEE LAMB.

STATEMENT OF THE CASE.

Plaintiff in his brief has so interwoven his inferences and conclusions with the facts, that it is deemed proper to state the facts as they came out at the trial.

This is a suit brought in the Circuit Court of the First Judicial Circuit, Island of Oahu, Territory of Hawaii, by Thos. Milner Harrison, plaintiff-in-error, originally against these defendants, J. Alfred Magoon, F. B. McStocker, Dorothea Lamb, subsequently Emerson, and L. C. Ables on two counts.

The claim in the first count is $10,000 damages for failure of the defendants to deliver to plaintiff stock of the market value of £2000 under memorandum of agreement hereinafter referred to as the Gilmore-Harrison agreement, attached to the complaint.

The second count was upon a foreign judgment for $10,600 damages, with interest, recovered in the Supreme Court of New Zealand, Northern District, for breach of that agreement against these defendants and Ables together with T. E. Cowart, J. H. Kirkpatrick and George D. Moore.

A demurrer to the complaint was filed (Tr. 7) on eight grounds, and sustained upon the ground of non-joinder of defendants, and plaintiff filed an amended complaint adding Cowart, Kirkpatrick, Powter, Wolfenden and Moore as parties defendant. In this amended complaint, he left out the second count on the foreign judgment, and relied only upon the first count under the agreement. Attention is called to the fact that though the New Zealand suit was against all the defendants in this case (Tr. 172) judgment was not rendered against Powter or Wolfenden.

The trial resulted in a non-suit in favor of these defendants and Ables (Tr. 207). Plaintiff then moved for a new trial and the motion was dismissed on the grounds: (1) that a motion for a new trial was improper in a case of decision and judgment of non-suit, and (2) that no notice of motion for new trial was given by plaintiff at the time of the decision and judgment of non-suit. (Tr. 208.) Plaintiff thereupon filed his bill of exceptions to our Supreme Court (Tr. 209) where these defendants and Ables moved to dismiss the exceptions on the following grounds:

1. That the aforesaid bill of exceptions of the plaintiff herein was not filed within the time allowed by law.

2. That no exception lies to the order herein dismissing plaintiff's motion for a new trial.

3. That no motion for a new trial lies after an order and judgment of non-suit.

4. That no notice of a motion for a new trial was given at the time that the order of non-suit was made in the above cause nor at any proper time. (Tr. 222.) Which motion was overruled (Tr. 223) and the bill of exceptions was heard and the exceptions were overruled (Tr. 231). Plaintiff then moved for a re-hearing and asked for leave to amend making Ables sole defendant. A re-hearing and leave to amend were both denied on the 6th day of March, 1905, after the law allowing appeals from the Territory to the United States Supreme Court was passed (Tr. 262) from which this writ of error is sued out.

The African Pacific and Indian Hagey Company, hereinafter referred to as the company, was a partnership formed in Honolulu, Territory of Hawaii, on the 10th day of April, 1897, between T. E. Cowart, J. H. Kirkpatrick, George D. Moore, A. E. Powter, J. Alfred Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, (who afterwards married J. S. Emerson,) for the purpose of "administering the formulae known as the Hagey Gold Cure and the establishment and disposition of Institutes for the purpose of administering the formulae" in the Territory of the Islands of the Pacific and Indian Oceans and Continent of Africa, exclusive of the Hawaiian Islands, (Tr. 155). The formulae were supposed to be secret.

Cowart, Kirkpatrick and Ables immediately started for the field of operation. Cowart and Kirkpatrick being appointed the attorneys in fact of Magoon and Lamb (Tr. 168), Ables being appointed the attorney in fact of McStocker, (Tr. 168,) Magoon, McStocker and Emerson continuously remaining in Honolulu. The method of operation in the establishment of an institute was to secure quarters centrally located and fit them up suitably for administering the remedies (Tr. 41-104-5). The appointment included reading-room, office, perhaps a few bed-rooms for patients, bath-room, etc., all this could be done for comparatively a small sum. The fund for starting the Tasmania institute being not more than £200 (Tr. 107, 138.) It was necessary to have a physician to administer the drugs who had to be engaged. The remedy is similar to the Keeley Gold Cure (Tr. 125-6) and is claimed to be a proper scientific

treatment for inebriety, opium and tobacco habits. It is supposed to remove the desire for intoxicating liquor, opium and tobacco, but does not put the subject in such a condition that he is thereafter unable to return to their use. The expected profits were to be derived from the charge for the administering of the formulae and selling the right to administer it in certain designated territory. J. Wolfenden, a rival claiming to own the Thompson formulae, was taken into the company by agreement dated the 10th day of April, 1897, (Ex. H, Tr. 165), in order to get rid of his opposition, without the knowledge or consent of these defendants. Plaintiff together with A. E. Gilmore, without the knowledge of these defendants, were taken into the company as partners for the territory of Tasmania, under agreement dated September 20th, 1897; the plaintiff contributing a sheep ranch which he valued at £2000 and Gilmore paying in £250 in cash (Tr. 4-30).

Under this agreement the suit is brought. The agreement contained in paragraph 4, the following provision "if at or before the expiration of a period of six months from the date of the departure of said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said company will give the said Gilmore or the said Harrison, *stock of the market value* equal to the amount paid by him of the £2250 mentioned in clause 2 hereof in some other district of the company's field of operations in exchange for the portion of said £2250 taken by him. * * *" The damages claimed are for refusal to deliver this stock. A fund of not more than £200 (Tr. 107) was created for the starting of the business in Tasmania and placed in the hands of Harrison.

Harrison started from Auckland for Tasmania on the 4th or 5th day of October and went as far as Sydney (1200 miles) where he received the medicines and instructions which were forwarded to him as per agreement. After reading the instructions he became dissatisfied with the venture, returned to Auckland for the purpose of recovering the £2000 (Tr. 128-137).

Failing in this he consulted a lawyer, who advised him to go to Tasmania and enter upon the business of the partnership for the purpose of laying a foundation for establishing his claim in court. (Tr. 131-135.) On the 17th day of January or nearly three months after the signing of the Gilmore-Harrison agreement, Harrison again left for Tasmania where he arrived in February, 1898, (Tr. 135-6) and took steps, as he claims, to open up an institute. He obtained no patients (Tr. 142) and did no business except to pay out money and to draw his own salary, which was to be a first charge on the profits after the expenses were paid. At about the end of February, 1898, Harrison returned to Auckland for the purpose of enforcing his claim against the company, where he brought suit and recovered judgment. No service having been made upon these defendants nor upon Ables, plaintiff failing to collect his judgment, brought this suit in Hawaii.

STATEMENT OF GROUNDS OF DEFENSE.

1. That a motion for a new trial does not lie from an order of non-suit, hence plaintiff has no standing in this court.

2. That Harrison cannot recover, as he made no bona fide attempt to be satisfied with the condition of the partnership business in Tasmania, and when he became convinced that the formulae were a humbug and fraud he waived the right to rescind when he continued the prosecution of the business.

3. That Harrison violated his agreement with the company by depleting the sum provided for starting the business in Tasmania in drawing his salary from that fund. Having himself broken the agreement he cannot enforce it.

4. That the stock to be given in exchange was an interest in the company in some other place than Tasmania, and not corporation stock, bank of England stock, live stock or stock of merchandise; and as Harrison makes no claim for damage for refusal to give him such an interest, his suit must fail.

5. That in the Harrison agreement the phrase "market value" means "equivalent in interest." Otherwise the provision to give stock of the market value of £2000 would under

the circumstances be an agreement impossible of performance which Harrison well knew. Therefore plaintiff has sustained no damage, and his suit must fail.

6. That there was no consideration moving to the company for the agreement to pay the £2000. The consideration, whatever it was, went to Ables, and Harrison cannot recover against any of these defendants; nor can he recover against Ables in this action.

7. That there was a want of mutuality in the Harrison agreement in the provision obligating the company to pay the £2000 and plaintiff's action must fail.

8. That the partnership agreement of the company with plaintiff is not binding upon these defendants neither is it binding upon Ables for the reason that it was not executed by all the parties to be bound by it, and the suit must fail. This result follows whether the agreement be joint or joint and several.

9. That the following named acts were beyond the scope of the partnership business: (1) To acquire the Thompson formulae. (2) To take in J. Wolfenden as partner. (3) To create a new partnership with Gilmore and Harrison. (4) To sell the right to use the Thompson formulae. (5) To sell the Tasmania district and to take in payment therefor a sheep ranch. (6) In the selling of the Tasmania district to guarantee Harrison the payment of £2000 in case of his dissatisfaction within six months. (7) To agree to give stock in some other field; and to agree to give any stock of the value of £2000. That therefore the agreement with Harrison is not binding on these defendants neither can plaintiff recover against Ables in this action.

10. That the agreement with Harrison whereby a liability was created in express violation of the partnership agreement, with the knowledge of Harrison, is not binding upon these defendants.

11. That the powers of attorney from Magoon and Emerson to Cowart and Kirkpatrick and from McStocker to Ables did not authorize the attorneys in fact to bind their principal to any act not authorized by the partnership agreement.

12. That there was no ratification by these defendants of any unauthorized acts. And whether or not the acts relied upon establish ratification is a question of law.

13. That plaintiff gave no notice to these defendants of his dissatisfaction within the six months required by his partnership agreement.

14. Plaintiff is precluded by his own conduct from recovery in this action.

15. The agreement sued on was without consideration and void.

The Supreme Court has passed adversely to these defendants upon grounds 1, 4 and 5 and as defendants claim incorrectly.

DEFENSE I.

Our statutes clearly provide that bills of exceptions must be filed within 20 days after final judgment.

Laws of 1902, Act 32, section 17.

Otherwise it comes too late.

Kapiolani Estate v. Peck, 14 Haw. 576.

In this case the proceedings shown by the record are as follows:

Nov. 9, 1903. Non-suit granted.

Nov. 12, 1903. Judgment entered.

Nov. 14, 1903. Motion for new trial filed.

Dec. 31, 1903. Time to file bill of exceptions extended till 10 days after disposition of motion for new trial. This order was invalid as the 20 days time for filing bill of exceptions had already expired.

Jan. 16, 1904. Motion for new trial dismissed (not denied, see order dismissing motion).

Jan. 16, 1904. Time for filing bill of exceptions extended till 20 days after completion of transcript.

It will thus be seen that the bill of exceptions was not filed within 20 days after final judgment, nor was any order extending the time made within those 20 days. Unless, therefore, the filing of the motion for a new trial two days after judgment,

operated to suspend it or prevent it from being final, the bill of exceptions was clearly too late.

Kapiolani Estate v. Peck, 14 Haw. 576.

We contend (1) that the judgment was clearly final, (2) that assuming a motion for a new trial would ordinarily prevent it from being final, no new trial can be granted by the lower court after a non-suit, (3) no notice of a motion for a new trial was given when the order of non-suit was made and hence the judgment was final despite the motion.

In early times non-suits were all voluntary and hence were not appealable, but now judgments of non-suit are regarded as *final* and appealable, being in *invitum.*

2 Am. Dig. Appeal and Error, Sec. 471.

The Corning Tunnel Co. v. Pell et al., 4 Colo. 184.

Holter Lumber Co. v. Fireman's Fund Ins. Co., 45 Pac. 209.

Lalande et al. v. McDonald et al., 2 Idaho 287.

The appeal under our statutes must be taken within 20 days after final judgment. The only and final judgment in this cause was made and entered on Nov. 12th, 1903. We contend that the true test of whether it is final or not is whether or not it can be appealed from, and a judgment of non-suit is unquestionably appealable without a motion for a new trial, since it raises a pure question of law.

Burns v. Commencement Bay Land & Imp. Co., 30 Pac. 668.

Lashus v. Chamberlain, 24 Pac. 189.

Cravens v. Dewey, 13 Cal. 40, 42.

Darst v. Rush et al., 14 Cal. 82, 84.

Kleinschmidt et al. v. McAndrews et al., 117 U. S. 287.

Luirance and others v. Luirance, 32 Ind. 198.

The Montmorency Gravel Rd. Co. v. Rock, 41 Ind. 263; 14 Encyc. Pl. & Pr. 789 and notes.

John McKeague v. J. R. Helen, 3 Haw. 328.

Plankington, Asge., Resp. v. Gorman Imp. App., 93 Wis. 562.

But not only do we contend that a motion for a new trial is unnecessary to review a judgment of non-suit, but that it is improper to move for a new trial after such judgment.

See Kleinschmidt v. McAndrews, 5 Pac. 281, 288.

A motion for a non-suit is in effect a demurrer to the evidence and the effect of sustaining it has the effect of sustaining a demurrer to the pleadings. The court on entering judgment loses control of the case and cannot order a new trial of the facts merely because it has given an erroneous judgment as a matter of *law.* We therefore claim that a motion for a new trial, being improper in the case of a judgment of non-suit, cannot prevent that judgment from being final and appealable. It was therefore necessary to file the bill of exceptions in this case within 20 days from the date of the judgment.

The practise in the Circuit Court where a motion for a new trial is pending, has always been to get the extension of time provided for by the statute before the motion is passed upon, which is granted as a matter of right, especially where the 20 days would have elapsed before that time. And the necessity of this seems to be clearly borne out by one of plaintiff's own citations.

Ballou's Appeals and Exceptions, p. 16.

Section 1462 of the Civil Laws provides that "immediately upon the rendition of a verdict, or a judgment of the Court in Banco, or of a judgment at chambers, judgment shall be entered, unless notice is given at the time of the rendering of the verdict, or judgment, of a motion for a new trial." It is thus plain that the only provision for a motion for a new trial is upon the verdict of the jury or the judgment of the court.

It is limited to the rendition of a verdict, judgment of the court in banco, or to a judge at chambers. It will be observed that there is no provision for a motion for a new trial from any ruling of a judge during the progress of a jury trial, which would include, of course, the granting of a motion for non-suit.

There is nothing to compel a person to include in a bill of exceptions an exception to the refusal to grant a new trial.

Section 1438 of the Civil Laws provides for a bill of exceptions and it expressly provides for exceptions at the trial. To say that a party may have a bill of exceptions for errors occurring at the trial, which would include a non-suit, and then permit him to move for a new trial and to allege exceptions for refusal to grant the same would be allowing two exceptions for the same matter. There is nothing which would prevent a person taking out a bill of exceptions for errors occurring at the trial and have those passed upon by the Court, and taking out another bill of exceptions on the refusal of the Court to order a new trial on the ground that the verdict was contrary to the law and the evidence. It is evident that counsel for plaintiff construed the law just as defendants contended when in this case they procured an extension of time for filing a bill of exceptions before the motion for a new trial was disposed of.

Plaintiff will not now be heard to say that any ruling of the court upon the introduction of evidence was error. All the errors occurring during the progress of the trial could not affect the question, as nothing was submitted to the jury, and any such errors would not in any way prejudice plaintiff. No new trial can be granted for errors not prejudicial, nor is it easy to perceive how a judgment on motion for new trial is that errors of law occurred during the trial.

In Abbot's Law Dictionary, on page 605, the word "trial" is defined "more strictly the examination of the facts in issue."

A motion which does not ask for a decision on issue of facts arising on the pleadings, is not subject for new trial.

Harper v. Hildreth et al., 99 Cal. 265, S. C. 33 Pac. 1103.

Gregory et al v. Gregory et al., 102 Cal. 50, S. C. 36, Pac. 364.

In the Standard Dictionary of the English language, "new trial" is defined to be "a re-trial of an issue of facts, granted,

because of a defeat of justice at a former trial, as through inadvertence, misconduct or surprise."

"If the findings are correct and the Court has erred in the conclusions of law therefrom, the remedy is not by motion for a new trial on the ground that the findings are contrary to law, but by exception and appeal or motion to correct the conclusions of law."

14 Ency. Pleading & Prac. 789.

In note 4 on the page last cited we find the following statement: "An error of the trial court in rendering conclusions of law not supported by the findings is an error which can only be reviewed by appeal, as it is not a decision 'against law' for which a new trial should be granted." *Shanklin v. Hall,* 100 Cal. 26; Matter of Doyle, 73 Cal. 564, distinguishing *Simmons v. Hamilton,* 56 Cal. 495.

"If the conclusions of law are erroneous the remedy is by motion to correct them or by exception. A motion for a new trial on the ground that the decision is contrary to law is not the proper remedy, since the error would not be corrected by a new trial as to issues of fact, *Rose v. Duncan,* 43 Ind. 163."

Luka v. Poohina, 3 Haw. 728.
Notley v. Kukaiau, 11 Haw. 525.
71 N. W. 608.

While some authorities hold that a new trial may be granted by the Court after verdict, for errors which had been committed by the Court in the progress of the trial, there is no authority which has been called to our attention which permits a new trial upon anything short of a verdict. An order by a judge granting a new trial where he himself has prevented the trial, that is, a determination of the facts by the jury, is a solecism. A new trial must be on the facts and not on the law. If a judge committed errors of law, and the verdict was right notwithstanding the errors of law, there could be no new trial. For harmless errors, it is a well settled rule, a new trial cannot be granted.

If the facts are agreed upon there is no trial but merely an argument on the law.

A motion for a new trial is addressed to the sound discretion of the court. A motion for a new trial on the law cannot be entertained for the obvious reason that matters of law do not rest in discretion. They are positive, existing rules which require no evidence to establish them, and which no testimony can change.

In a jury waived case, if the court should grant a non-suit there could be no such thing as a motion for a new trial. What a court could do would be to vacate the non-suit, open up the case and hear testimony for the defense, but it would not try the whole case over again.

See case of *Hitchcock et al. v. Hustace,* 13 Haw. 641-652.

Non-suit is no bar to subsequent action.

Vivas v. Aswan, 11 Haw. 282.

The power to grant a new trial is solely to prevent injustice in matters over which the judge has no control. The jury is the judge of the facts, and its verdict, unless the trial court has a right to set it aside, would, however unfair, in a great majority of cases be final.

The refusal or granting a motion for a new trial is in this jurisdiction a proper ground for exceptions. It is the only way of taking the matter before the appellate court on the question of whether or not there is evidence to sustain it.

For the court to grant a new trial on questions of law is self-stultifying. It is based upon a request to pass in judgment upon his own proceedings. What assurance is there that it would be any more correct in its second judgment than in its first? If it might be certain that upon the hearing of the motion for a new trial in granting the non-suit that it was wrong, it would be another matter, but there can be no certainty that the second view of the law would be more correct than the first. The appellate court can only finally establish the law of the case.

The court should not have it in its power to cause such an injustice to the parties to a suit as to be able to discharge the jury and then grant a new trial because it thought, upon reflection, it had made a mistake. There are perhaps few long trials where the judge makes no mistakes, and mistakes which might appear vital to him upon reflection, but when the jury had been discharged these mistakes are beyond recall. If this were not so it would make no difference how long or how expensive the trial, the judge would have the right to dismiss the jury and then order a new trial; a tremendous power for oppression in the hands of an unfair, unjust, or even ignorant judge. The power might be so used that there might never be an end to a trial. A judge for some motive, good or bad, grants a non-suit, then grants a new trial.

Independently of the question of whether or not a new trial can be granted upon a non-suit, the right to grant a new trial is controlled by statute. It can only be granted in the case specifically authorized. See the California cases first cited.

"The proper and only practice is to apply to the court to take off the non-suit." 14 Cyc. 463 n.

"The decision on this question rests in sound discretion." Id. 460.

In a case tried before the court without a jury, there is no authority for a motion for a new trial on the merits and an order denying such a motion presents no question for review.

Resenquest et al. v. Canary et al., 50 N. Y. S. 111-112.

In this jurisdiction it was held prior to the decision on this motion that a new trial can only be granted on notice of a motion given at the time of the termination of the trial, which was not and could not have been done in this case.

Kekaua v. Kalei, 3 Haw. 683, and on a writ of error, p. 714.

DEFENSE II.

Harrison's agreement is dated September 20, 1897. He set out from Auckland for Tasmania October 4th or 5th (Tr. 126), arriving at Sydney, 1200 miles on his journey, he received the drugs and instructions from the company. Upon reading the instructions, he then and there became dissatisfied with his bargain (Tr. 104-128), knew he was deceived (Tr. 126), viewed it as a humbug and believed it would not be successful (Tr. 127-130). He did not want to be a party to the humbug (Tr. 128) and Robison had told him he had been taken in (Tr. 127). Harrison viewed the contract to treat patients under the Hagey formulae dishonest (Tr. 137). Harrison then returned to Auckland to get his sheep ranch back. To confirm his prejudice against the treatment, he tried it at Auckland on a cook, (Tr. 120), and it was a failure. Then he loitered until January 17th, almost three months from the date of his contract, before he made another start. He dates his real departure from Auckland from this latter date, claiming that the first start was futile as he did not reach his destination or as he puts it (Tr. 128): "Well, I did not consider that I really started for Tasmania until the 17th day of January, for the simple reason I intended to go to Tasmania. It ended in a false start and I came back before I got there." In other words he himself being 1200 miles on his journey, decided to make the start a false one and reasons that a false start is no start. This matter should be called to the attention of Mark Twain. Harrison's claim that he made a bona fide attempt to transact the business in Tasmania in view of this testimony does not agree with the experience of mankind. Harrison's testimony as to what he did to start a business which was valued at £5000, found in the transcript above referred to, plainly shows that his attempt was merely perfunctory with a view of laying a foundation for a suit in court, and had a verdict been rendered against defendants upon that ground it would be set aside and judgment *non obstante* rendered for defendants.

That Harrison admits that when he received at Sydney the instructions with reference to the Hagey treatment, he then and there believed the Hagey cure to be a humbug or fraud; and thereupon by continuing in the business, the object of which was to carry on the fraud, he waived his right to rescind the contract and to be dissatisfied, and cannot recover.

Pintard v. Martin, Smedes & M. Ch. 126 Miss.
Weeks v. Robie, 42 N. H. 316.
Lawrence v. Dale, 3 Johns. Ch. 23.
Knuckolls v. Lea, 29 Tenn. 577.
Downer v. Smith, 32 Vt. 1, 76 Am. Dec. 148.

Harrison has admitted that the treatment was a humbug. It is therefore impossible for him to have been satisfied with the condition of the business in Tasmania. A person cannot in law be satisfied with the prosecution of a fraudulent enterprise. If he starts out with the intention of humbugging the public he cannot, as a matter of law, be dissatisfied if he fail, because the law will not recognize such a dissatisfaction. It must be in good faith. Honesty is its pre-requisite. It is a contradiction of terms to say that he was honestly dissatisfied with his want of success in a dishonest transaction. Such a dissatisfaction leaves Harrison where it found him. The law cannot assist him to recover upon any such iniquitous claim.

Election to rescind must be prompt. After Harrison discovered the fraud he should have rescinded immediately.

24 A. & E. Cyc. of Law 1111.

And notice to rescind must reach the seller.

43 A. Digest Cc. 483, Sec. 319.

DEFENSE III.

A cursory view of Harrison's testimony referred to in Defense I will show that his attempt to start an institute at Hobart would of necessity be abortive. This may be in a measure accounted for because of his belief that the remedy was a hum-

bug and that it would be dishonest to administer it to a patient. The success of a business depends entirely upon the man at the head. No man unless he were crazy would ever consent for a minute to have his business conducted as was this Tasmania institute. But when we find Harrison appropriating to himself the funds provided for establishing the institute, is it any wonder the project failed? His salary was made a first charge upon the receipts and by implication, was not to be paid until there were receipts. The rule is that where there is a condition precedent to be performed by the plaintiff he cannot recover unless he shows that he has performed it or some good excuse for nonperformance. 9 Cyc. 699.

Now if Harrison had given away the entire fund placed in his hands so that he had nothing to start the Tasmania business with it would appear very clear that he would have no standing in court, in case he was obliged to give the business a fair trial before he could bring suit. If he took one dollar of the money without right he would be in just the same position. It might be impossible to prove that by the taking of £40, Harrison's salary for February, he prevented the success of the business, and so the law ought not and it is submitted does not call upon the defendants to prove that it did prevent the success. Harrison having admitted that he took £40 from that fund for his own private uses, and so put it out of his power to conscientiously perform the condition precedent, his suit should fail.

DEFENSE IV.

It seems plain that the stock to be given plaintiff under paragraph 4 of the Gilmore-Harrison agreement was an interest in the Hagey business in some other field than Tasmania; the use of the word "stock" being equivalent to interest. Hence it was not a covenant that there would be stock of the market value of £2000, but merely the right to exchange the interest which he received for an interest in some other locality. Any other construction would bind the company to have stock in some other field than Tasmania. It would be forced to incorporate and issue corporate stock. This the company would have no right

to do as it was limited by the partnership articles with which plaintiff was familiar, to the administering of the formulae and establishment and disposition of institutes for the purpose of administering the same (Tr. 156). There is no suggestion in the partnership agreement that the company should form corporations and issue stock. That there was not such a plan is evidenced by the silence of the partnership agreement. The general plan was to establish institutes or headquarters where the treatment should be given (Tr. 105), and then sell out. This was Harrison's understanding as shown by his letter proposing settlement dated March 10th, 1898, (Tr. 188), wherein he agrees to accept in settlement £1900 and £100 in stock knowing full well there could be no stock as such for the company to give him. As the company had no stock to give and no right to acquire stock it was impossible to give Harrison stock and the guaranty so to do was void for impossibility of performance. 9 Cyc. 326.

On page 121 Harrison says that Cowart and Kirkpatrick said to him: "We have an interest more than that value (£2000) in the new company formed to work in New South Wales. Q. They said what? A. They had stock of more than the value of £2000 in the new company they had formed to work in New South Wales and they would save 1-5 in that with £5000 cash. Q. You knew that didn't you? A. I was informed so by several people. Q. You inquired before you made your contract? A. Yes, sir. Q. And found that was true? A. They had saved a 1-5 interest in New South Wales."

The apparent object was to sell institutes carrying with them territory, not to run institutes with a view of making money out of them as a permanent business. The money was to be made in the sale of territory.

The stock or interest was to be given "in exchange." The idea conveyed by the word exchange is not a cash transaction such as it would be if the contention of Harrision is correct, for stock of a certain market value is the same as cash. What was the purpose of putting it in that way if it was intended to return Harrison the money in case he should be dissatisfied.

If it was to be stock and not an interest what difference should it make to plaintiff whether it should be in Tasmania or some other place for the most he could get out of it would be £2000. It might be most convenient for him to be given the stock while he was yet in Tasmania.

DEFENSE V.

Harrison had, without success, been for some months trying to sell his sheep ranch (Tr. 116). If his present contention is correct, he found a sure purchaser in the African Pacific and Indian Hagey Company on the most advantageous terms. He secured an opportunity of engaging in the Tasmania business, which promised large returns, at a fixed salary, and in case his expectations of profit should not be realized, he might at any time within six months demand his £2000. But this was not all, he might have carried on the business for several months at a great profit; and then it might have suddenly collapsed, giving him cause to become bona fide dissatisfied "with the condition of the partnership business in Tasmania." He then could have demanded back his money. It is not reasonable to claim that the company contemplated any such thing.

If then it was to be an interest in the Hagey Cure Enterprise there could of necessity be no market value to it. Such an interest could not have a market value any more than the interest of Tasmania, which Harrison bought. Who could say what the market value of an interest in the partnership should be? The value of an interest in a continuing partnership depends entirely upon the willingness of the other partners to take the purchaser of the selling partner into the firm. It is not possible that it could have a market value for the reason that a market value presupposes that there should be something on the market, not a mere intangible interest, the exact value of which could not be definitely known outside of the members of the partnership and where outside persons would have no way of investigating the facts, except by the courtesy of the other members of the firm. It was a covenant to do an impossible thing

and is controlled by the same authorities cited under Defense IV, viz.: 9 Cyc. 326.

Much of the success of a business ordinarily depends upon secrecy, and in this case it depended entirely upon secrecy as to the ingredients of the Hagey formulae (see last clause of company partnership agreement, Tr. 158). Harrison cannot contend that an interest in a partnership may have a value because the business may be wound up and the purchaser of an interest can then get his share for the reason that the whole plan was that it should be a going concern.

The Tasmania venture was to depend upon Harrison's efforts. It had no market value and could have none as no one could estimate what was to be the value of the personal services of plaintiff. In other words, Harrison paid £2000 for an interest in Tasmania, the value of which could not by any possibility be definitely known. Harrison now claims an impossibility, that is, if dissatisfied, he was to receive an interest which had an established value. The value (not the market value) would depend entirely upon confidential or partnership relations and consent of all the other co-partners. He cannot claim damages upon an agreement impossible of performance.

The company were not permitted to give stock in the same field as they would have been allowed to do had it been anything other than an interest in the Hagey business. For what difference could it make to Harrison whether or not the stock which he was to receive, if it were Bank of England stock, should be given him in some other place than Tasmania.

The £2000 was to be paid by stock, that is an interest in the Hagey Cure. If it had been the intent to pay in cash, in case there was no such stock, why was it not so stipulated? Harrison bought an interest in the territory of Tasmania not in shares of stock in a stock company or corporation. It was to be in exchange not a cash payment. The company could have no interest in making an exchange if Harrison could claim stock of the market value of £2000. For in that case they could turn their stock into cash as easily as Harrison could. The idea

of the word "exchange" shows plainly that they were to exchange an interest in one place for an interest in another.

Harrison desired to purchase an interest in the company's Tasmania field. He had no money, but did have a sheep ranch in the mountains; three or four days' journey from Auckland. The company, without knowng inuything of the country or the value of the sheep run, agreed to take the ranch at the valuation placed upon it by Harrison, practically a stranger to them, Harrison knowing that the company had no right to acquire such a business and bind the absent partners. The company not being in the sheep business shortly afterwards sold the ranch for £500. It had no use for the sheep run and had no power to acquire it, all of which Harrison was bound to know. The new company had placed a fund in Harrison's hand and started him for Tasmania, trusting as events proved the success of the enterprise wholly to him. No man of sense would have purchased the sheep ranch in any such manner. Yet this is just what Harrison claims the company did. Not only bound itself to purchase but to subject itself to a large outlay in the Tasmania venture in the hands of Harrison under a salary. It is doubtful if such a guaranty was ever heard of before. First a guaranty as to the efficacy of the formulae, second a guaranty as to the business ability of Harrison, third a guaranty of his honor that he would give the business a fair trial and honestly try to be satisfied, and fourth a guaranty that the business would be successful. It will be observed that it was not to be prosecuted for full six months but he had the right to be dissatisfied at any prior time.

It seems plain that the true intent of the words "market value" means nothing more than an interest in the company to the extent of £2000 in case of Harrison's dissatisfaction in Tasmania, and in which case he was to have the right to go to some other place and share in like proportion in the profits which his own efforts combined with his other partners should make. This right was never denied him. This is borne out by the testimony of Ables whom plaintiff called, who states that the £2000 mentioned was "simply a matter of putting in something, we should have put in £5000 just as well." (Tr. 82, 43.)

DEFENSE VI.

There was an entire failure of consideration. The agreement recited £2000. The proof shows a sheep run conveyed to Ables which he subsequently sold for £500 (Tr. 44-66). Not one dollar of consideration moved directly from Harrison to the company. That Ables subsequently chose to give the benefit of his unauthorized act to the company can give no right of action against it by Harrison. Whether he changed his mind about going into the sheep business or not, or whether or not he ever had any intention of going into the sheep business does not make any difference as to the legal obligations of the parties under the contract. Ables had it in his power to do what he chose with the sheep run. The company had no hold upon him. It is submitted that this court will not enforce the agreement against these defendants when they had no rights under the agreement against Ables. Harrison has himself alone to blame for this kind of contract. So far as these defendants are concerned, it must be considered in either one of two ways; first that Harrison is not telling the truth when he says that his sheep run was worth £2000, and deliberately imposed upon the company, or second, that Ables defrauded the company when he sold the sheep run for £500. These defendants should not be placed in the position of being obliged to follow up this transaction.

If the sheep run had been conveyed directly to the company, there can be little question, but what the signature of all the members of the company would have been necessary to the sale of it; for it was not a matter within the scope of the business of the company; and the personal signature of each member of the company would have been required for its disposition; their attorneys in fact under the powers could not have signed for them as it was beyond the scope of their powers. Thus these defendants would have been protected against any fraudulent disposition of the sheep run and would have been in a position to have turned back to Harrison at least their share of it in case of dissatisfaction.

DEFENSE VII.

Harrison bound himself to give nothing for the £2000. He bought an interest in the business for his sheep ranch. He paid nothing for the right to rescind the agreement and get back his £2000. The guarantee for payment of the £2000 was more in the nature of a penalty than anything else. As there was no mutuality, he cannot recover. Harrison bound himself to do nothing whatever.

In *Dorsy v. Patwood,* 12 How. 126, 136, 13 L. ed. 921, speaking of the contract, the court says:

"It is signed by both parties and is expressed in clear and precise terms but there is one characteristic necessary to give it validity. As a binding contract, it is clearly deficient. It wants mutuality. It imposes no obligation on Dorsy whatever. He is not bound either to render services or pay money as a consideration for one-half of the land."

In *Slee v. Bloom,* 19 Johns. 482, Spencer, C. J., says:

"On the other hand, if any of them have subscribed, under a general assurance from the appellant that he would take the stock off their hands, if they should require it, and they have gone on acting as stockholders, until the affairs of the company have become bad, and then require a fulfilment of the assurance, they can have no right, either in law or in equity, to an exoneration from contribution.

"It will be at once seen, that there would be no mutuality or reciprocity in such a bargain. If the concern was profitable then they would hold on upon their shares; if unprofitable or disastrous, then they would throw the loss upon the appellant. They would thus make him run the risk of all the losses, whilst they took the chance of all the profits."

See also 9 Cyc. 327-8.

DEFENSE VIII.

The amended complaint in this suit makes as parties defendant, Magoon, McStocker, Emerson, Ables, Cowart, Kirkpatrick, Powter, Wolfenden and Moore.

The complaint as originally filed had as parties defendants only Magoon, McStocker, Ables and Emerson, leaving out Cowart, Kirkpatrick, Powter, Wolfenden and Moore. The suit in the New Zealand court has the same parties defendant that are made defendants in the amended complaint in this suit (Tr. 3). The judgment, however, in the New Zealand suit was not rendered against all of the defendants, that is not against Wolfenden and Powter, so we have this anomolous condition. A judgment is recovered in the New Zealand court against Magoon, McStocker, Ables, Emerson, Cowart, Kirkpatrick and Moore, leaving out Wolfenden and Powter, and in this suit the plaintiff is trying to recover judgment against all of the defendants named in the amended complaint, including Wolfenden and Powter on the very same cause of action.

It appears affirmatively that Moore did not sign the Gilmore-Harrison agreement and no showing is made that Powter's name was signed by any one with power so to do. It appears affirmatively that the names of Magoon and McStocker were signed to the agreement without authority. There is no showing that Moore and Powter ratified the agreement and an affirmative showing that Magoon and McStocker and Lamb did not ratify it. Under these circumstances, plaintiff can in no event recover against any of the defendants, and this is true whether the Gilmore-Harrison agreement is joint or joint and several. The Supreme Court (13 Haw. 360) held that the agreement was joint and several. This was merely *obiter dicta* and it overruled itself in its last decision on plaintiff's bill of exceptions. The expression in the agreement "for themselves individually and the said company collectively" has no reference to the payment of a penalty of £2000 but only to the creation of the partnership. It will be remembered that Harrison

and Gilmore were uniting with the partnership already formed, the old partnership collectively assuming a new partnership relation and at the same time each of the old partners associating himself individually with each of the new partners. This is all that the phrase "for themselves individually and the said company collectively" could possibly mean.

When we consider the provision of the guaranty or penalty, we plainly see that the *several* feature is no longer present for the penalty is not to be paid in cash, but in stock of the market value of £2000 in some other district of the company's field of operation. We have shown that this meant an equivalent interest in the business. The obligation to give stock was a partnership obligation and not a several one. There was nothing in the nature of things why there should be an individual liability apart from the joint liability.

If then the agreement was joint and unauthorized as to any there can be no recovery upon it as recovery must be against all jointly or none. 9 Cyc. 755.

Whether the agreement is joint and several or joint is not so important, for plaintiff has elected to make all the partners jointly liable. He must recover against all or none. On joint and several obligations each party may be sued separately or all jointly. Any number more than one and less than the whole cannot be sued. 9 Cyc. 657.

The consequences of joint liability make the question of ratification unimportant. Plaintiff claims to have proved that Wolfenden was a partner, and though his name is not in the body of the Gilmore-Harrison agreement, he bound himself by signing it just as the others did (9 Cyc. 301). The law is as stated by the Supreme Court in this case, that until a written agreement prepared to be signed by several has been signed by all it is not binding on any. (7 Am. & Eng. E. L. 111.) All the authorities relied upon by plaintiff in denial of this rule are on uniliteral instruments, such as bonds and for obvious reasons don't apply.

DEFENSE IX.

The company was a non-trading partnership and the doctrine of general agency does not apply, and there is no presumption of authority to support the acts of the partners executing the contract with Gilmore and Harrison. (See *John Harris v. Mayor,* Baltimore, 8 L. R. A. 677.) In this case the court quote with approval the following:

"It is laid down as the settled law that one partner in a non-trading partnership cannot bind his co-partner by a bill or note or note drawn, accepted or indorsed by him in the firm name, even though it be for a debt of the firm, unless either he has express authority therefor from his co-partner or giving of such instrument is necessary for the carrying on of the partnership business or is usual in similar partnerships; and the burden is upon the party sueing on such note or bill to prove such authority, necessity or usage."

Plaintiff contends that the agreement is joint and several. This these defendants dispute (see Defense VIII), but if it were joint and several, one partner would clearly have no right to make it on behalf of the firm.

The purchasing of the right to use the Thompson formulae was wholly foreign to the objects of the partnership. There was no limit to the damage that might have been caused by administering it, and the sale of the right to use it was inherently vicious.

The same objection applies to the taking in of Wolfenden as to taking in Gilmore and Harrison.

The sale by one partner of his interest terminates the partnership; the purchaser has no right to bind the remaining partners. In this case we might have been associated with the biggest scoundrels on earth who, as partners, could in 24 hours ruin each one of these defendants by transactions fairly within the scope of the partnership business with persons who had no knowledge of the restrictions in the partnership agreement as to the creating of liability, or for torts where there was no restriction.

Nothing can be easily conceived as being more foreign to the business of the partnership than to buy a sheep ranch. It might just as well had been a gold mine, railroad or steamship line. If the partners had the right to buy a sheep ranch and go into the sheep business, they had a right to do anything. No authority can be found, it is believed, to justify this conduct on the part of the partners.

While it may be conceded that a partner might have the power to bind his co-partner to a sale on approval where such was the custom or where the particular business required such sales, it is contended that such a power is most pernicious and should be very strictly guarded. Such sales open the door wide for fraud. When the goods are in the store they are supposed to be safe and protected by insurance; when they are withdrawn they may go into irresponsible keeping and become liable to be lost, stolen or destroyed with no protection to the non-consenting co-partner. In this case no custom or necessity was shown for this most extraordinary sale. It was inherently vicious and not within the power of a partner to make without the consent of his co-partners.

It would be bad enough if in the sale of the territory for £2000 in which it is claimed the guaranty was made that the £2000 should have been in cash so that the partners could have been benefited by it to the full extent of the value placed upon the sheep; but to give the guaranty for a sheep run, which was subsequently sold for £500, thereby causing a loss to the partnership of £1500 and then claim that the nonconsenting partners were bound by the agreement is to us nothing less than monstrous.

The giving of the guaranty shocks one's sense of square business dealing. It might just as well have been for £10,000 or a much greater sum. It might have been for the entire unsold territory of the company. It might have been for the expenses of Harrison to Africa at a salary of £2000 a year. Fancy has no limitations and imagination no bounds as to what evil could not follow the sanction by the court of the right to give the guaranty contended for.

To agree to give stock in some other field, was clearly without the power of the partner or agent. In the first place as has been pointed out, the company had no stock and no right to acquire stock; but if it had stock, it should be permitted to give stock to Harrison upon demand whether in Tasmania or any other place. It ought not to be forced to go to some other district of its field of operation to give Harrison the stock. This provision is so unusual and exceptional that strong proof ought to be given of some necessity usage or custom to justify it. There being no such proof, Harrison should not be permitted to claim that the company is bound by any such provision.

DEFENSE X.

It is well settled that a partner may limit his liability to those with knowledge of the inhibition in the partnership agreement.

"Whatever, as between the partners themselves may be the limitations set to each other's authority, every person not acquainted with those limitations is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, as ordinarily carried on by other people. But no person is entitled to assume that any person has a more extensive authority than that above described. The consequences of this principle are:

"That if an act is done by one partner on behalf of the firm, and it was necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* be liable, although in point of fact the act was not authorized by the other partners. * * * In the first case the firm will be liable unless the one partner had in fact no authority to bind the firm, and the person dealing with him was aware of that want of authority." (1 Lind on Part., pp. 236-7-8.)

"The act of one partner to bind the firm must be *necessary* for the carrying on of its business; if all that can be said of it was that it was convenient or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners, nor it seems will necessity itself be sufficient; if it be of extraordinary necessity.

What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test, and therefore, in a case where the nature of the business was one in which there was no necessity to borrow money to carry it on under ordinary circumstances and in the ordinary manner, the court held the firm not liable for money borrowed by its agent under extraordinary circumstances, although money was absolutely requisite to save the property of the firm from ruin." (1 Lind on Part., 239.)

The members of a partnership may, by their agreement, restrict the authority of one or more of them to bind the firm and any act done in contravention thereof with notice is not binding on the firm. 22 Am. & E. Ency. of L., 142.

"When the articles of co-partnership expressly deny the right of each partner, without the consent of the other to bind the firm for borrowed money, a contract in violation of such agreement, would not be valid though it was made in furtherance of the interests of the firm."

King v. Levy et al., 13 So. 282.

If there was any one thing that was intended to be made clear by the agreement it was that the partners should have no right to create liability.

In the first place there was to be no liability for the salary of the officers. In the second place it is expressly stated that none of the partners will give or endorse any note or create any liability on behalf of the company. In the third place a fund of $2625.00, being 2½% on $105,000.00, was levied on the partners as will be seen by the amounts returned to Magoon, namely, £61 on $12,500.00 invested; to Lamb £12-1-6 on $2500.00 invested (Ex. K, Tr. 168-9); to McStocker £24-7-5 on $5000.00 invested (Ex. E, Tr. 162-3). This fund was supposed to be sufficient for the successful launching of the business and no partner was to be liable for losses other than from this fund.

How human ingenuity can read into this contract an intention to authorize the creation of partnership liability without

limit with those who had notice of the agreement, it is impossible to see.

The only escape for plaintiff is to contend that the guaranty for payment of £2000 is not a liability, but this he cannot do as he speaks of it in his brief (page 5) as a liability as well as in his testimony (Tr. 121-2).

The business of the company was the administering of the formulae known as the Hagey Gold Cure and the establishment and disposition of institutes; for the purpose of administering said formulae, a fund necessary for the establishment and maintenance of the institutes was placed in the hands of Cowart, Kirkpatrick and Ables.

On page 19 in plaintiff's brief, it is stated that "The right of the partners to incur liability in connection with the fund is not only apparent on the principle, *expressio unius est exclusio alterius,* but especially is expected from the clause that forbids the creation of liability, while the losses were to be borne in accordance with the proportional share, which each may hold and the managing partners were to render accounts once a month or oftener if necessary of all * * * the losses by them or any of them sustained." In other words it is argued that inasmuch as the partnership agreement provided for the sharing of losses it nullifies the prohibition against the creation of liability. Is it not unfair to claim that an express prohibition is to be annulled by inference; that a plain expression of intention is to be set aside by a statement which can in no event be more than equivocal? The sharing of losses like the sharing of profits is a matter personal to the partners. It does not affect other persons. No one not a partner can share the losses or profits of the business. So what does it matter to outside persons that partners have agreed to share the profits and losses in a certain proportion. The statement "sharing the profits and losses," is only for the purpose of ascertaining the pro rata share of each partner in the profits and losses. But it is said that inasmuch as a provision for losses is contained in the agreement it must of necessity follow that a partner may create liability. That this is not true is easily proved. For instance an agreement of partnership

which contains no provision as to the sharing of losses states that one partner shall not give a note on behalf of the company without the consent of the others. One partner gives a firm note for $100 without such consent to the person who has full knowledge of the agreement. The other partner denies liability. According to plaintiff's contention, he would be bound on the theory that the law itself says that partners shall share the losses. Though not a word is contained in the agreement about sharing losses, the law writes the word losses into the agreement and we cannot get away from it any more than from the air we breathe.

Again plaintiff fails to distinguish between contractual losses and those that arise from acts of omission or accident. As to the former, partners may limit their liability, as to the latter, they cannot; instances of the latter would be losses from fire, bad debts, mal administration of the Hagey formula through which persons should be injured. To take the money of the company to pay the running expenses of the business is a very different thing from making a guarantee with a person who knows that by the partnership agreement, a partner is expressly prohibited from giving such guaranty. In the eye of the law all expenses are losses, and are carried to the debit of loss and gain account when the books are closed. Losses that arise from torts cannot be controlled. It would be against public policy for a partner to be permitted to protect himself against damages arising from torts committed in the prosecution of the business. It is therefore perfectly apparent that the provision for sharing losses has no possible relation to the limitation upon individual partners with reference to contractual liability.

The very purpose of creating the fund was to obviate the necessity of creating any partnership obligation. To contend that no debts could be contracted for the establishment and prosecution of the business, which might be necessary in case the fund had proved insufficient and which might have been small in amount, and in the same breath to contend that a partner honest or dishonest could, with or without collusion, create a

liability which might ruin all his co-partners is most inconsistent.

The language of the agreement prohibiting the creation of liabilities is plain: "where, however, there is no imperfection or ambiguity in the language of a contract, and it contains no technical terms of art, science or trade, it will be considered as containing the entire and exact meaning of the parties." 9 Cyc. 773.

It might be contended with greater force that Gilmore or any other of the Tasmania partners would have the right to bind that company to a liability similar to that involved in this case for there is no prohibition against creating liability in the Harrison-Gilmore agreement. In that event doubtless, plaintiff would change his views as to the powers of partners and agents to create liability on behalf of co-partners and principal.

In fact we hear Harrison (Tr. 146) making the same complaint, that his partner, Robison, created an unauthorized liability in the matter of the sheep run.

DEFENSE XI.

The powers of attorney (Exhibit B, Tr. 158 and Exhibit J, Tr. 168) especially restrict the acts to be done to matters authorized by the company's partnership agreement.

It seems to be contended that the powers of attorney should be construed to authorize acts expressly prohibited by the partnership agreement for the reason that the giving of such powers was otherwise useless. In other words, that no good reason can be found for the giving of the powers unless it was to enlarge the powers of the partners to whom they were given.

This argument has no force for it makes no difference what the intention of the parties was so long as that intention was not expressed in the power. In the first place these powers of attorney must be construed precisely as though they had been given to third persons or not to members of the partnership. In such a case it would be such a simple proposition that there would appear hardly room for argument, that the attorney in fact would not be authorized to do any act prohibited by the partner-

ship agreement or beyond its scope. A clearer case even would be if all the partners had executed a power of attorney like those in this case; no one would contend that it gave the extraordinary powers contended for. But the assumption that the powers of attorney were unnecessary unless to enlarge the powers of the partners is wholly without foundation. The last clause of the partnership articles provides: "That no partner shall under any circumstances whatever reveal the ingredients of the said formulae before he administered them, and any person purchasing the right would necessarily want to have knowledge of the formulae. In this connection it is worthy of note that the contents of the formulae could be made known to third persons with the consent in writing of all the other partners first obtained; but there was an absolute inhibition to the incurring of liability.

Then again it was proper to have some one to receipt for the dividends, if any there might be, of the absent partners; and it was proper, if not absolutely necessary, to have some one on the spot to sign the names of the absent partners to the disposition of any real estate the company might acquire.

A case very nearly in point is *Horne v. Ingraham,* (Ill.) 16 N. E., where G. S. Ingraham gave to his partner, William S. Ingraham, a power of attorney at the same time as the creation of the partnership with power to sign his name to any instrument in any and all business pertaining to the real estate business or otherwise that he might desire to do and to perform every act and thing whatsoever requisite and necessary to be done in and about the premises. The court say: "The general expressions in the power of attorney should be limited to the clear and obvious intent and object of the agency. The language in the power was used in connection with the subject matter of the partnership agreement, and will be presumed to have related to that matter, and will be construed and limited accordingly. * * * By the terms of the instrument which Horne induced William to sign * * * the partnership * * * was materially changed. * * * Granvelle's interest of one-half * * * was reduced to one-third. A new partner was admitted into the firm in the person of Horne * * *

These extraordinary provisions * * * do not come legitimately within the language used in the power of attorney."

An agent has no right to bind his principal to a warranty without express authorization or proof of usage.

Pickert v. Marston et al., 32 N. W. 550.
Bierman v. City Mills, 30 N. Y. Supp. 929.
Wait v. Borne, 123 N. Y. 592-604; 25 N. E. 1053.
Argersinger v. McNaughton, 114 N. Y. 535-538; 21 N. E. 1022.
Smith v. Tracy, 36 N. Y. 79, 81.
Herring v. Skaggs, 62 Ala. 180; 34 Am. Rep. 4.
Herring v. Skaggs, 73 Ala. 446.
Upton v. Suffolk County Mills, 65 Mass. (11 Cush.) 586; 59 Am. Dec. 163.

Proof of the usage authorizing the giving of such warranty must be made by the party claiming the breach of it.

There is an utter failure of proof by the plaintiff of user, custom or necessity for the guaranty to give plaintiff stock of the market value of £2000.

Herring v. Skaggs, 62 Ala. 180.

In *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, the court say: "The authority to act for another is a legal question for the court to decide if only one inference can be drawn from the evidence and that is want of authority."

The existence of an agent's authority is purely a question of fact; what he may do by virtue of it is a question of law.

Glen v. Savage, 13 Pac. 442.

DEFENSE XII.

Harrison relies upon ratification (Tr. 110). This must be discussed under two heads: (1) Knowledge of all the material facts, (2) Retention of benefits.

Under the first head Harrison charges defendants with *implied knowledge*. He charges these defendants with notice, not on what he (Harrison) did in communicating with

them but on what he failed to do, in consequence of which these defendants failed to communicate with him. Although they never heard from him nor from any other living person that there was such a man as Thomas Milner Harrison until they received a copy of the summons in his New Zealand suit about July 23, 1898, and never had any reason to believe that there was such a man, Harrison knowing all of the time, full well, of the whereabouts of these defendants, now complains because they did not write him to ascertain the particulars of his agreement with the company. If he had apprised these defendants or any of them of the particulars of his agreement he would be in a different position, but we fail to see how Harrison can successfully claim ratification predicated upon the fact that he failed to do his duty to us.

Harrison charges these defendants with implied knowledge in that they failed to make enquiries of their co-partners as to the particulars of the Gilmore-Harrison agreement with the company as soon as they received the information contained in memorandum enclosed in letter of Ables to McStocker (Ex. D, Tr. 161) dated Oct. 2, 1897, and in letter of Cowart to Magoon (Ex. I, Tr. 170) dated Oct. 7, 1897. These letters contained information to the effect that they had sold a one-half interest in Tasmania for 8000 sheep and leasehold valued at £2000, but of uncertain value and £250 cash.

We fail to follow plaintiff's reasoning when he claims that because Moore came to Honolulu, it necessarily follows that he told these defendants all the material facts with reference to the agreement with plaintiff. In the first place Moore did not sign the Harrison agreement. He refused to sign. (Cowart's letter, Ex. I, Tr. 170.) And he must be presumed not to know its contents. In the next place he knew very little about the details of the business (Tr. 39), and last Mrs. Emerson testified that she did not recollect that Col. Moore said anything about the Tasmania contract (Tr. 86). Ables testified to the same effect (Tr. 53-4); even Ables did not remember saying anything about the Harrison agreement to these defendants after his return to Honolulu (Tr. 56).

Plaintiff further claims that these defendants acquired full information of the condition of the business from the trial balance signed by Ables. This contention, of course, is wholly without merit for any novice in bookkeeping knows that a trial balance shows nothing about the details of the business. It merely shows the number of accounts and the amount to the debit and credit of each account, and is taken solely for the purpose of verifying the accuracy of the books. This is forcibly illustrated by the examination of plaintiff's counsel of Ables, the bookkeeper, as to the meaning of the different items appearing in the trial balance. (Tr. 51.)

It is indeed difficult to see how plaintiff can attempt to lead the court to the belief that these defendants before the agreement with plaintiff, knew of the material facts of any transaction entered into by the partners in Australia. The citations from the transcript in plaintiff's brief conclusively show just the opposite. They never knew the material facts of any transaction other than that they received on about the 23rd day of July, 1898, a copy of the New Zealand summons in the suit brought by Harrison, to which was attached a copy of the Gilmore-Harrison agreement. Then was the first time that they knew definitely of the contract with Harrison. In this connection the attention of the court is especially called to the letter of Magoon to Cowart and Kirkpatrick dated Sept. 23, 1897, (Ex. 7, Tr. 100) written in Honolulu three days after the agreement was signed and the letter dated September 16, 1897, (Ex. 9, Tr. 204). Also to the letter to Dexter dated Sept. 23, 1897, (Ex. 6, Tr. 199) and the letter to him dated Dec. 16, 1897, (Ex. 8, Tr. 201).

In *Hull v. Young*, 3 L. R. A. 521, the question was whether Young ratified the giving of the note and the court say:

"Now whether it was ratified is a question of fact, but what constitutes ratification may be and was made below in this case by the requests to charge a question of law. The judge was called upon to say whether a certain state of facts would in law amount to a ratification.

"Now what is ratification? Ratification is the affirmance and approval of an act giving sanction and validity to something done by another. Can this be done without the party charged with such approval knowing the nature of the act approved?

"In the case below * * * the judge was called upon to instruct the jury that it (the giving of the note) could have been ratified by Young without his knowing the note was a sealed note. In other words that the act might be ratified without Young knowing what the act was. We do not see how this could be possible, * * * and when he was requested to charge in substance that Young might ratify his partner's sealed note without knowing that it was a sealed note, we do not see how he could have done otherwise than he did."

The partners making the Gilmore-Harrison agreement were in New Zealand, and these defendants had no opportunity to repudiate it before final consummation. See

Swayne v. Union Mill, &c., 49 S. W. 518.
Williams v. Stonne, 46 Tenn. 203.
Amory v. Hamilton, 17 Mass. 103-109.

"The fact that a wife, under a mistaken belief that a note and mortgage executed by her husband, as her agent, for money borrowed by him, was binding on her, acquiesced in the payment of installments of interest on the note, does not constitute a ratification of his act."

Brown v Rouse, 104 Cal. 672, 675-6, 38 Pac. 507.

"A paper, authorizing an agent to sell any goods he might bring in the store and with the goods of the principal, and draw out the avails of such goods, is not authority for purchasing on the principal's credit, and it is not a ratification of such purchase that in compliance with the terms of the paper, some of the avails went to the principal's credit without his knowledge or consent."

"To show a ratification by a principal of the unauthorized contract of an agent by the acceptance of its benefits, it must

appear that the principal had knowledge of the material facts, or that he intentionally accepted the benefits without inquiry."

Jewell Nursery Co. v. State, 59 N. W. 1025.

"To establish ratification, knowledge of all the facts, before receiving the fruits of the sale, must be shown."

Thompson v. Craig, 16 Abb. Prac. 29.

"The receipt by the principal, of the proceeds of the sale of a horse, sold by an agent, is not a ratification of the agent's warranty of soundness, unless, at the time of receiving the money, he knew that the warranty had been given."

Croom v. Swan, 1 Fla. 211-216-7.

"That a firm used money borrowed by a person not a member does not amount to a ratification by the firm if it had no knowledge of the fact that money had been borrowed."

Eggleston v. Mason, 51 N. W. 1.

"A ratification by the principal will not be presumed from his acceptance of the profits of an agent's services unless he has knowledge of the sources and circumstances thereof."

Howe Mach. Co. v. Ashley, 60 Ala. 496.

"No necessity to make inquiry as to a completed transaction."

Combs v. Scott et al., 12 Allen p. 497.

(2) The retention of benefits.

Town's Adm. v. Hendee, 27 Vt. 258-263.

"The mere receipt by the principal, of the proceeds of the sale of his own property in ignorance of an unauthorized warranty by an agent, is not ratification of it."

Smith v. Tracey Executor, 36 N. Y. 79.

"If money due a principal from his agent is obtained by such agent by the unauthorized use of the principal's name, and paid

over to the principal who received it in good faith, without notice, he is not liable to the party from whom the agent got the money. The fact that he keeps the money after being informed of how the agent obtained it, is not a ratification."

Case v. Hammond Packing Co., 79 S. W. 732, and many cases therein cited.

There is not a particle of proof that these defendants received Harrison's money. The proof is just the reverse, although Harrison's money. The proof is just the reverse, Ables says the dividend was declared Oct. 29th, (Ex. E, Tr. 163), and this is borne out by Cowart. On Oct. 7, Cowart writes (Ex. 1, Tr. 170): "I know we will take a lot of cash before next mail," and on the 30th he writes (Ex. K, Tr. 169) of remitting Lamb and Magoon 18% and speaks of closing a deal the day before, out of which they received £5000. Now on Oct. 31 or two days after the dividend was declared, there was cash on hand £94-7-8 trial balance (Ex. 4, Tr. 194). This together with £110, which was the company's share of the fund to start the Tasmania business (Ex. 1, Tr. 168), makes £204-7-8. This they had on hand and in the hands of Harrison when the dividend was declared. There is no evidence as to what amount was paid out after the dividend was declared and before the trial balance was taken on Oct. 31, 1897, and so far as we know, more might have been paid out than the entire amount received from Harrison and Gilmore, namely from Harrison £50 on account of the note given by Robison; and from Gilmore £250, making £300. In fact Ables certifies (Tr. 71) that the dividend of £3780 was paid out of the £5000.

Then so far as Harrison was concerned we find that £50 had been received on account of the sale of the sheep and the company had on hand and in Harrison's hands £204-7-8. But if it is claimed that it had received £300 on account of the Tasmania deal, it must be remembered that £250 had come from Gilmore and as the guarantee to pay ran to them individually, the contract might have been ratified by these defendants as to Gilmore and repudiated as to Harrison. Harrison had no right

to claim ratification by these defendants because they might have received and not returned some of Gilmore's money.

In *Baldwin et al. v. Bumons et al.,* 47 N. Y. 199, on page 213, Repallo, J., says:

"The mere fact that the proceeds of the contract made by one person in the name of another or a portion of them have come to the hands of the latter is not of itself sufficient to render him liable on the contract. To have that effect the proceeds must be received not only with knowledge but under such circumstances as to constitute a voluntary adoption of the contract. * * * Clearly if defendants received part of the proceeds innocently as the money of Blanchard their subsequent omission to return what they had received could not make them liable upon the original contract."

A leading case on the question of notice and ratification is that of *Thompson v. Murphy et al.,* 53 S. E. (W. Va.) 908:

"The rule, that notice to the agents of facts arising from and growing out of the subject matter of this agency, is constructive notice to his principal, has no application to the case where the question is, whether the act relied on to bind the principal was done within the limit and scope of the agent's authority. * * * A principal is not bound by the acts of his agent beyond the extent of his authority except by ratification after full knowledge of the material facts. This rule of itself negatives the view that the knowledge of the agent is notice to the principal. If it were, proof of such knowledge would be unnecessary. As to such acts there is no relation of principal and agent. The acts are not within the agency. * * * There can be no ratification by *acquiescense* unless the principal has full and complete knowledge of all the material facts attending the unauthorized acts."

"Knowledge by the principal of the material facts is an essential element of an effective ratification by him of the unauthorized acts of his agent."

Fitzgerald v. Kimball Bros. Co., 107 N. W. 227.

"An employee bought and sold cotton through a broker in the name of his employer who on hearing what had been done said

it ought not to have been done without consulting him. The employee informed the employer that his act was an error of judgment, and that if he could from his salary make the loss good, he would do so, to which the employer made no response. Held not to show ratification."

Norden v. Duke, 99 N. Y. Supp. 30.

In *Slee v. Bloom,* 19 Johnson 482, the court say:

"Silence unless when a person is bound to speak and when silence would mislead can never have the affect attributed to the appellant's conduct."

But in case these defendants had received some of Harrison's money in the dividend that was paid them and though they had received it with full knowledge of the fact of the Harrison agreement, they would still not be bound. How would it be possible for them to determine what portion of the dividend that they received should be returned to Harrison. Could they be called upon to return the whole £2000? This, of course, would be absurd. Should they return the £500? Harrison would not have thought of accepting that and it would be a vain thing for them to be called upon to do it. Should they have tried to figure out what proportion of the Harrison money they had received? This would be, if not impossible, at least impracticable. They would have to take the risk of settling up the partnership affairs and ascertaining exactly what amount was to be returned to Harrison of what they had received. This they never had any means of ascertaining, for after Ables left New Zealand no accounts of the receipts and disbursements were given to defendants nor to Ables. It then appears that if by any possibility any of the consideration derived from the Harrison sale came to these defendants, it was so inextricably mixed with the money of these defendants that it would be impossible to ascertain what, if anything, they should return to him; and because they deemed it impossible, the law will not impose upon these defendants the duty of ascertaining what amount they should repay to Harrison of the amount that they

might have received from him, which, under the most favorable circumstances, would be but trivial, at the risk if they failed in their exact duty to make them liable to the payment of £2000.

Harrison was not in any way induced to do anything to prejudice himself by anything these defendants did.

Acts that amount to acquiescence must be such as to prejudice a party who claims the benefit of them.

Elizabeth Doughaday v. James Crowell et al., 11 N. J. Eq. 201.
Manning v. Lelland, 153 Mass. 510, 27 N. E. 519.
Bohart v. Oberne, 13 Pac. 389.

"A ratification may be implied from the acceptance of the benefits of the unauthorized act * * * but here, as in other cases it is indisputable that the principal should have had full knowledge of the material facts, or that he should have intentionally accepted the benefits without inquiry, otherwise the receipt *and retention* of the benefits of the unauthorized act cannot be deemed a ratification of it."

Willison v. McKain, 39 N. E. 888.

"The respondent authorized an agent to negotiate for the sale of certain lands belonging to him, among which was a lot known as the Potter lot, and to sell the same on his consent. The agent agreed by parol to sell the lands, including the Potter lot, and the respondent received the money for the same and held the same, when, sometime after a demand was made upon him for a conveyance of the Potter lot, *and still retained the same.* The respondent, however, did not know at the time he received the money that the Potter lot was included by the agent in the sale, and on the trial denied that it was so included except upon certain conditions not complied with by the petitioner. Held that the agreement of the agent for the sale of the Potter lot was neither authorized nor ratified."

Lester v. Kinne, 37 Conn. 9.
Jackson and another v. Badger, 26 N. W. 908.
Combs v. Scott et al., 12 Allen 497.

"The ratification of a sale by an agent must be unequivocal and with full knowledge of all the facts in order to be effectual. Failure to answer letters or inquiries from the agent as to the consummation of the sale do not constitute a ratification."

Bosseau v. O'Brien, Fed. Cas. 1667.

There was no such actual or constructive notice of the contract with plaintiff as to bind defendants, Magoon, McStocker and Lamb, even though a part of plaintiff's money entered into the dividend received by them.

"The supposed principal must not only have full knowledge of all the material facts relating to the contract, but also of every fact requisite to enable him to repudiate it or the means of knowledge must be at hand."

Ladd v. Hildebrant, 27 Wis. 144.

The question of ratification we have contended under Defense VIII has in any event nothing to do with the case because the agreement is joint and recovery must be had against all the defendants or none, and in this case recovery can in no event be had against all.

DEFENSE XIII.

The Gilmore-Harrison agreement provided in section 4, that if at or before the expiration of a period of six months from the date of the departure of said Gilmore or the said Harrison from New Zealand to Tasmania, the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him. Harrison first started for Tasmania about Oct. 4, 1897, (Tr. 127). He was dissatisfied with the business upon reaching Sydney (Tr. 137), which must have been about Oct. 7. The New Zealand suit was filed April 18, 1898, (Tr. 173) 13 or 14 days after the expiration of the six months and

that is the first notification that any of the defendants had that Harrison was dissatisfied. He never told them that he was dissatisfied. (Tr. 141.) At this time the partners in the company in the A. P. and I. Company had scattered to the four corners (Tr. 110). The company was no longer doing business, and unquestionably service of process upon one would not bind the others. 15 Ency. Pl. & Pr. 900 and note, and 902-3-4.

So the notice of dissatisfaction came too late to affect any of the partners that might have been in Australia when the suit was filed; for if Harrison could give notice of his dissatisfaction one day after the expiration of the six months, there is no reason why he could not give such notice any time before the statute of limitation ran against the claim. There is no evidence, however, of when or upon whom the summons were served in Australia; but it must have been prior to June 13, 1899, the date of the recovery of the New Zealand judgment. This notice would, of course, not be binding in any way upon these defendants nor upon Ables, the proceedings with reference to whom were begun Thursday, June 9, 1898, (Tr. 171) when an order was made of services upon these defendants, L. C. Ables et al. This was two months and five days after the expiration of the six months. Service being made on them in Honolulu about July 23rd, 1898, (Tr. 147).

It was like a contract of sale or return where if the vendee does not elect to keep the property he must return it according to the terms of the contract.

An action will not lie on a contract payable in anything other than money until after a special demand made.

Parr v. Johnson et al., 35 N. W. 176.

Where the plaintiff's rights of action under the contract are in the alternative, he must notify the defendant of his election to create a cause of action.

Center v. Center, 38 N. H. 318.
Rewrick v. Goldstone, 48 Cal. 554.

A person who is induced to part with his property on a fraudulent contract may, on discovering the fraud, avoid the contract and claim a return of what he has advanced upon it. Fraud discharges the contract *ab initio* and the fraudulent purchaser has no title. But if the party defrauded would disaffirm the contract, he must do so at the earliest practicable moment after discovery of the cheat. That is the time to make his election and it must be done promptly and unreservedly. He must not hesitate nor can he be allowed to deal with the subject matter of the contract and afterwards rescind it. The election is with him, he may affirm or disaffirm the contract, but he cannot do both; and if he concludes to abide by it, as upon the whole advantageous he shall not afterwards be permitted to question its validity.

The party who would disaffirm a fraudulent contract must return whatever he has received upon it. This is on a plain and just principle.

Mass v. Bovet, 1 Denio. 73-4.

The attention of the court is called to the fact that in this case Harrison never offered to return what he received under the agreement, that is the right to operate in Tasmania, nor did he ever offer to exchange that right for any other territory.

6 Am. & Eng. E. L. 471-473.

The longest time that Harrison could have had to accept the offer to pay him his £2000 was to have mailed it from Auckland, to which place he had returned at the end of the six months. 9 Cyc. 290. This he does not claim to have done.

DEFENSE XIV.

What Harrison gave for his interest under the Gilmore-Harrison agreement was a sheep run which was valued at £2000. He paid no cash. The sheep run was of no value to the company over and above what it would sell for. This Harrison knew. The most that he could under any circumstances expect was

that the company would make an arrangement with Ables so that Ables would take the sheep run. When Harrison became dissatisfied with his agreement he wanted to get his sheep run back again. This he might have done had there been any fraud or misrepresentation on the part of the company or any other reason for a recision of the Gilmore-Harrison agreement. Instead of taking prompt measures to get his sheep run back again, he loiters in Sydney, returning to Auckland November 1st (Tr. 130). He fears that the company will dispose of the sheep run (Tr. 132) and so he telegraphs, without knowledge of the company, over the country, to all the people he knew that has ever seen those sheep except Robison, that he claimed the sheep and not to buy them (Tr. 102). Robison was the very man to whom Ables sold the sheep run, after he had made diligent attempt to sell the same to other parties.

Harrison claims that the £500 for which the sheep run was sold was the price of the wool on their backs. (Tr. 133.) Is it any wonder that Ables could not get a higher price and is it any one's fault but Harrison's? It would be most inequitable to permit him at this time to say that the sheep were worth £2000 or £1900. Even after the sheep was sold to Robison for £500, there should have been, under all the circumstances, a way to have secured their return to Harrison. Robison had given his notes for the sheep run, and one note of £50 only had been paid in cash, leaving a balance due of £450. If Harrison had been diligent in the matter, he undoubtedly could have recovered the sheep upon the payment of £50, and these defendants could not in any event have been called upon to pay more than his actual losses, the £50 plus his expenses.

DEFENSE XV.

The agreement sued upon is not binding upon these defendants for the reason that their rights were complete under the first agreement, dated Sept. 16, 1897, (Ex. O, Tr. 78). This agreement has been incorrectly copied into the record. The 4th clause should read: "That if at the expiration of six months

from the date of departure of the said Gilmore or the said Harrison from New Zealand to Tasmania," either should be dissatisfied the company would give stock of the market value of £2250. The apparent cause of this error is that the agreement was changed in pencil for recopying (Tr. 98) and the pencil marks were never erased. Plaintiff, however, correctly states the agreement on page 4 of his brief.

Under this agreement Harrison was obliged to give a good title to the entire sheep run. 9 Cyc. 316.

Under the second and third agreements whereby Harrison secured material concession, namely the right to become dissatisfied within six months, the rights of these defendants were given up or forfeited without consideration. This could not be done even though the partnership agreement or powers of attorney authorized the making of the contracts of Sept. 16 and 20 or 23rd.

MISCELLANEOUS.

In case the court should hold that the non-suit was wrong as to Ables it would not disturb it as to the defendants Magoon, McStocker and Emerson, if it was right as to them.

A new trial may be granted as to one without disturbing the verdict as to the others.

Sims et al. v. State, 13 S. E. 551.
First Nat. Bk. v. Williams, 26 N. E. 75.
Albright v. McTighe, 49 Fed. 817.

Court may deny in part and grant in part.

Bennett et al. v. Closson, 38 N. E. 46.
W. A. Benton v. Ruffin V. Collins, 47 L. R. A. 33.

In *Penn. Railroad Co. v. Jones,* 155 U. S., on page 354 (39 L. C. P. Co. 183), plaintiff was allowed to elect to become nonsuit as against the Penn. Railroad Co. and take judgment on the verdict against the other defendants. See also *The Washington GGas Light Co. v. Thomas Lansden,* 172 U. S. 534 on page 557 (43 L. C. P. Co. 543).

Plaintiff claims that he should be allowed to amend his compaint in order to hold Ables.

Amendments rest in discretion and no reason is shown why the refusal of the court in disallowing the amendment amounted to an abuse of discretion. In fact to claim that Ables should be called upon to alone pay the guaranty, shocks the conscience. By the greatest stretch of imagination, it could not be contended that Ables ever intended to become individually liable to pay the £2000 or any part thereof.

The rule is that where one familiar with the powers of an agent deals with such agent in matters clearly beyond the power conferred upon the agent, the agent is not personally liable.

1 A. & E. Ency. L. 1127.

Therefore the authorities cited in plaintiff's brief on pages 44-5-6-7-8 do not apply. And this is perhaps a good illustration of the citations throughout plaintiff's brief. The rules of law stated in the citations may be entirely correct but it is submitted they are not in point.

The last contention of plaintiff in his brief as to the discretion of the court in granting a new trial seems to require no answer other than the discussion hereinabove contained.

It is respectfully submitted that the decision of the Supreme Court of the Territory of Hawaii should be affirmed and the writ dismissed with costs against the plaintiff.

Alfred Magoon

W. Lee Stroke

Dorothea Emerson

Dated Honolulu, December 18, 1906.

Supreme Court of the United States.

No. 107.—October Term, 1906.

Thomas Milner Harrison, Plaintiff in Error,
vs.
J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden, and George D. Moore.

In Error to the Supreme Court of the Territory of Hawaii.

[April 22, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to review a judgment for the defendants in a suit upon a contract. Haw. . At the trial a nonsuit was ordered, subject to exceptions taken by the plaintiff. A motion for a new trial was made but was dismissed, and this dismissal also was excepted to. The Supreme Court held that the former exceptions were presented too late, but that the latter was open and raised the question whether the judgment of nonsuit was right as matter of law. It discussed this question and sustained the judgment. This was on December 14, 1904. In January, 1905, a petition for rehearing was filed; it was entertained by the Court, and, after argument, was denied on March 6, 1905. The defendants in error now move to dismiss, the main ground being that the Act of March 3, 1905, c. 1465, § 3, (33 Stat. 1035,) amending the Act of April 30, 1900, c. 339, § 86, (31 Stat. 141, 158,) granting writs of error, &c., does not apply.*

It is answered for the plaintiff in error that, as the petition for rehearing was entertained and acted upon by the Supreme Court of the Territory, the time to be considered is the date when the petition was denied, and that that was after the statute went into effect. *Voorhees* v. *John T. Noye*

*Act of April 30, 1900, c. 339, § 86 . . . "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. . . . ."

Amended by Act of March 3, 1905, c. 1465, § 3, by adding at the end of the section: "*Provided*, That writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars."

Manufacturing Co., 151 U. S. 135. *Northern Pacific Railroad Co.* v. *Holmes*, 155 U. S. 137. No doubt the decisions cited and others show that where a right to take the case up exists at the time of the original judgment, the time limited for the writ of error on appeal does not begin to run until the petition for rehearing is disposed of. But there are limits to even that rule. When an appeal in bankruptcy, required by General Orders in Bankruptcy, xxxvi, 2, to be brought within thirty days after the judgment or decree, was not brought within that time, the fact that a petition for rehearing was filed within the time required by the Court below, but after the thirty days, was held not to prolong the time for appeal. "The appellant could not reinvest himself with that right by filing a petition for rehearing." *Conboy* v. *First National Bank of Jersey City*, 203 U. S. 141, 145. If at the time of final judgment there is no right of appeal whatever, it is perhaps even plainer that a party cannot evoke a new one by filing a petition for rehearing, even if, by accident, it is kept along until an act giving an appeal is passed. Whether in any event a writ of error would lie in this case it is unnecessary to decide.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.